TRANSCRIPT OF

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1894.

No. 82.

JOSHUA BISHOP, APPELLANT

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 26, 1894.

(19,021.)

(19,021.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 92.

JOSHUA BISHOP, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

JOSHUA BISHOP, Claimant,
vs.
THE UNITED STATES. } No. 21914.

I.—*Petition and Amended Petition.*

The original petition in this cause was filed June 14, 1900, and by leave of court the same was amended, and the said amended petition in lieu of the original was filed June 20, 1900 and is as follows:

1½ *Petition as Amended and Exhibit "A."*

Filed June 20, 1900.

JOSHUA BISHOP, Claimant,
vs.
THE UNITED STATES. } No. 21914.

To the honorable Chief Justice and associated justices of the Court of Claims:

The petition of Joshua Bishop, commander United States Navy (retired).

Your petitioner, Joshua Bishop, respectfully shows:—

(I.)

That he is a citizen of the United States; that on the 20th day of September, 1854, he was regularly and duly appointed acting midshipman in the Navy of the United States; that in the year 1858 he was regularly and duly appointed midshipman, served during the civil war, and on March 3rd, 1865, was regularly and duly promoted to lieutenant commander; that your petitioner and claimant has at all times borne true allegiance to the Government of the United States, and that the facts above and hereafter stated he believes to be true.

(II.)

Your petitioner and claimant further respectfully shows, that he served the Government of the United States as stated in paragraph (I); that on February 8th, 1865, he was regularly and duly ordered to the U. S. S. "Wyoming," which proceeded to the Asiatic station, and served therewith until September 12th, 1867, when he received an order, of which the following is a copy:—

"U. S. FLAG SHIP HARTFORD,
"HONG KONG, CHINA, *September* 12, 1867.

"SIR: You are hereby detached from the U. S. S. Wyoming, "and will report to Lieut. Commander C. C. Carpenter, for passage "to the United States in the U. S. S. Wyoming, under his command. "On your arrival you will report in writing to the honorable Sec- "retary of the Navy.

"I am, respectfully, H. H. BELL,
"*Rear-Admiral, Commanding Asiatic Squadron.*

"Lieutenant-Commander Joshua Bishop U. S. S. Wyoming."

2 That in obedience to said order, petitioner and claimant on his arrival in the United States, reported in writing to the Honorable Gideon Wells, then Secretary of the Navy, and on February 9th, 1868, reported in person, and received an order, of which the following is a copy:

"NAVY DEPA-TMENT,
"WASHINGTON, *February* 8, 1868.

"SIR: The naval general court-martial before which you were "tried September 9th, 1867, found you guilty of the charges pre- "ferred against you, and sentenced you 'to be dismissed from the "naval service of the United States.' The sentence of the court in "your case having been approved by the President, you are hereby "dismissed from the naval service of the United States, and from "this date you will cease to be regarded as an officer in the United "States Navy.

"Respectfully, G. WELLS.
"*Secretary of the Navy.*

"Mr. Joshua Bishop late lieutenant commander U. S. Navy, navy yard, Boston, Mass."

Your petitioner and claimant shows and avers that the order just above referred to, was the first knowledge or intimation that he had of the alleged findings and sentence rendered against him resulting from alleged court-martial proceedings hereinafter referred to.

(III.)

Your petitioner and claimant further respectfully shows and avers that his alleged dismissal from the naval service of the United States, on the order referred to in paragraph (II), was illegal and utterly void; that the alleged court-martial proceedings in said order referred to, and on which said alleged order of dismissal was based, were from the beginning utterly illegal and void; that said alleged court-martial was not legally constituted as required by Art. II, of an act for the better government of the navy, approved July 17, 1862, in this: that it does not appear on the face of the said

alleged court-martial proceedings, that no more officers, other than those named, who composed said alleged court, could be summoned to compose a court of thirteen members without injury to the service; that said alleged court-martial proceedings are also void in this: that H. H. Bell, rear admiral, commanding Asiatic squadron, who convened said alleged court-martial, did not review the proceedings of said alleged court, and did not approve or confirm the findings and sentence of said alleged court, as directed and required, — Art. 20, of an act for the better government of the navy, approved July 17th, 1862; that said order of dismissal (alleged) referred to in paragraph (II) above, is illegal and void and of no effect, as well also, are said alleged court-martial proceedings upon which said alleged order is based, for this: that said alleged sentence of said alleged court-martial, extending to the dismissal of your petitioner and claimant, who at that time was a commissioned officer of the said navy, was not confirmed by the President, as required by Art. 19, of the act hereinbefore mentioned; that the alleged findings and sentence of said alleged court-martial were unjust; that the alleged record of said alleged proceedings *are* not in form or substance sufficient in law to warrant the issuing of the alleged order of
3 dismissal referred to in paragraph (II) above; that the said alleged findings of said alleged court-martial were contrary to the evidence and the weight of evidence entertained by said alleged court, and that claimant from the time of the issuance of said alleged order of dismissal to the present time, used every due diligence and effort to have said and every of said orders and proceedings set aside, for nothing holden, and to be restored to his place and rights in grade and pay.

(IV.)

Your petitioner and claimant further respectfully shows and avers that the precept for the alleged naval general court-martial, referred to in paragraph (III) above, was alleged to have been issued on the U. S. flagship "Hartford," Hong Kong, China, September 4th, 1867, by H. H. Bell, rear admiral, commanding United States Asiatic squadron; that said alleged court-martial assembled and met on U. S. steamer "Wachusett," Hong Kong harbor, China, on September 6th, 1867, and that petitioner and claimant has hereto annexed and to be considered as a part hereof, a copy of said alleged court-martial proceedings to which he begs leave to refer if it be necessary so to do.

(V.)

Your petitioner and claimant further respectfully shows and avers that on May 31st, 1867, in the harbor of Nagasaki, Japan, on the U. S. steamer "Wyoming," he was punished for the same identical alleged offences, designated as charges first and second and specifications thereunder, and on which petitioner and claimant was again tried and con-

victed by said alleged court-martial, as appears by the said proceedings hereto annexed; that said conviction by court-martial proceedings was illegal. Petitioner and claimant further avers that he was not guilty of the several alleged offences charged and specified in said alleged court-martial proceedings, and avers that he was not guilty of any offences for which he was punished as first above mentioned in this paragraph, and pleaded said previous punishment in bar of said proceedings, as appears by the same.

(VI.)

Your petitioner and claimant further respectfully shows and avers that he was promoted lieutenant commander as above stated, and was always legally entitled to that rank and pay of that grade, and was illegally deprived of his pay of his said grade from February 9th, 1868, to March 9th, 1871, and in other respects from September 13th, 1867, until Feb'y 8th, 1868; that petitioner and claimant claims that he is entitled to receive from the United States, pay, the sum of $8024.79 as follows:—

From February 9th, 1867, to March 9th, 1871	$7767 66
Difference between sea and shore pay from September 13th, 1867, to January 31st, 1868	241 05
Difference between sea pay and waiting orders Feb. 1–3, 1868	9 23
Difference between shore pay and waiting orders, February 4–8, 1868	6 85
	$8024.79

4

(VII.)

Your petitioner and claimant further respectfully shows and avers that he is the person interested in claim mentioned in paragraph (VI) above, and that no assignment or transfer of his said claim or any part thereof has been made; that he is entitled to the whole and every part of said claim from the United States, after allowing all just credits and offsets and demands, and is entitled to a judgment for the sum of $8024.79.

(VII½.)

Petitioner and claimant further shows and avers that on the ninth day of March, 1871, he received a commission reappointing him lieutenant commander of the U. S. Navy, which he avers was intended as a reinstatement; that at the time and since he (has) denied that he was legally dismissed the service, and avers that he was diligent in the prosecution of his rights.

(VIII.)

Petitioner and claimant further shows and avers, that the above stated cause is instituted in the above named court under and by

virtue of an act entitled "An act for the relief of Joshua Bishop," of which said act the following is a copy:

"(PRIVATE—No. 645.)

"Be it enacted by the Senate and House of Representatives of the "United States of America in Congress assembled, That the claim "of Joshua Bishop for alleged items of pay and unpaid to him for "services as a lieutenant-commander, United States Navy, between "the dates of September thirteenth, eighteen hundred and sixty "seven, and March ninth, eighteen hundred and seventy one, be, "and the same is hereby, referred to the Court of Claims. Jurisdic- "tion is hereby conferred on said court to try said cause—the statute "of limitation shall not apply thereto—and to render final judg- "ment therein, subject to the right of appeal by either party.

"Approved, June 6th, 1900."

(IX.)

Your petitioner and claimant, the premises considered, therefore prays, that this honorable Court of Claims of the United States will consider each and every the matters and things hereinbefore set forth, necessary to be considered; will set aside as for nothing holden the said court-martial proceedings, as well the finding and sentence thereof; as well the said order dismissing claimant from the said service to the end that said claimant may receive his just claims; that there may be granted to petitioner and claimant the several writs and processes of the said court to be issued out of said court as the necessities of your humble petitioner and claimant or his said cause may require; and that this honorable court may grant to your petitioner and claimant judgment in his favor on his said claim and all lawful additions thereto, and that the said honorable court may grant all relief, general, particular and special, to your petitioner and claimant to which according to the law of the land he may be entitled.

And your petitioner and claimant will ever pray, &c.

JOSHUA BISHOP,
Petitioner and Claimant.
IRWIN W. SCHULTZ,
Attorney and of Counsel with Petitioner and Claimant.

UNITED STATES OF AMERICA, }
District of Columbia, City of Washington, } *ss:*

Joshua Bishop, the above named petitioner and claimant, being duly sworn according to law on his oath saith, that he read the above petition, and knows the contents thereof; that the statements therein contained as made of his own knowledge are true, and those

made on information he believes to be true; that the sum therein claimed is justly due to him after allowing all just credits and offsets, and that no assignments or transfer of said claim or any interest therein has been made.

JOSHUA BISHOP.

Subscribed and sworn to before me this 15th day of June, A. D. 1900.

[SEAL] GEORGE W. TAYLOR,
Notary Public.

Filed June 15th, 1900.

6 THE UNITED STATES OF AMERICA:

In the Court of Claims.

JOSHUA BISHOP, Claimant,
vs.
THE UNITED STATES. } No. 21914. On Petition. Amendment.

To the honorable Chief Justice and associated justices of the Court of Claims.

Your petitioner and claimant, Joshua Bishop, begs to amend his petition filed in the above stated cause, by adding at the end of paragraph (I) of his said petition, the following:—

"Your petitioner and claimant further shows and avers that he has not in any way voluntarily or otherwise aided, abetted or given encouragement to rebellion against the said Government."

JOSHUA BISHOP,
Petitioner and Claimant.
ERWIN W. SCHULTZ, *Attorney.*

UNITED STATES OF AMERICA,
District of Columbia, City of Washington, } ss:

Joshua Bishop, the within named petitioner and claimant, being duly sworn on his oath saith, that the matters and things set out in the above amended petition are true.

JOSHUA BISHOP.

Sworn and subscribed before me on this 18th day of June, A. D. 1900.

[SEAL.] GEORGE W. TAYLOR,
Notary Public.

Filed June, 1900.

7 Proceedings of a naval general court-martial, convened on board of the U. S. steamer "Wachusett" in Hong Kong harbor, China, in the case of Lieutenant Commander Joshua Bishop, executive officer of the U. S. steamer Wyoming, by virtue of an order hereunto appended and marked "A."

NAVY DEPARTMENT, *November* 9, 1869.

A true copy.
HOLMES E. OFFLEY,
Chief Clerk.

U. S. steamer Wachusett, Hong Kong harbor, China.

10 O'CLOCK A. M., SEPTEMBER 6, 1867.

At 10 o'clock a. m. the court met pursuant to the order hereunto appended and marked "A."

Present: Commander John C. Febiger, senior member,
Commander R. W. Shufeldt, member,
Commander Geo. E. Belknap,
Lieutenant Commander F. H. Baker,
Lieutenant Commander L. A. Beardslee,
Lieutenant Commander F. R. Smith,
Lieutenant Commander F. J. Higginson,
and Passed Assistant Paymaster Samuel T. Browne, the judge advocate.

The accused, Lieutenant Commander Joshua Bishop, was also present.

The judge advocate then read aloud the order convening the court, and the warrant appointing the judge advocate, hereunto appended, and marked respectively "A" and "B."

The judge advocate then asked the accused if he objected to any member of the court, to which the accused replied "no." The judge advocate then asked the accused if he knew of any reason why the court should not proceed with his trial, to which the accused replied "no."

The judge advocate then asked the accused if he desired to employ counsel, to which the accused replied that he did, and named Captain James Forney, of the U. S. steamer Hartford, a captain in the U. S. Marine Corps, who was then introduced into court. The judge advocate was then duly sworn by the presiding officer, and the court duly sworn by the judge advocate in the presence of the accused.

The charges and specifications of the charges were then read aloud by the judge advocate, appended and marked "C."

By the judge advocate: Lieutenant Commander Joshua Bishop, you have heard read the charges and specifications of the charges preferred against you, how say you—"Guilty or not guilty?"

Answer: I plea in bar of trial that I was placed under arrest for the offense specified, and was fully released from the said arrest by

order of Rear Admiral Bell. I refer the court to paragraph 1205, Book of Regulations for the Government of the U. S. Navy, and also to the log book of the "Wyoming."

8 The court was cleared for deliberation to consider the plea presented by the accused, and a copy of such part of the log book as the accused wished to refer to, a copy of which is here appended and marked "D."

The court having maturely considered the plea, decided that it was inadmissible. The court was again opened and the accused and counsel came into court, and the accused was informed by the presiding officer that his plea was inadmissible.

The accused was then asked by the judge advocate: "You have heard the charges and specifications of the charges preferred against you, how say you—"Guilty or not guilty?"

In answer to this question the accused remained mute.

Lieutenant Commander STEPHEN A. MCCARTY, a witness on the part of the prosecution, was called into court, and duly sworn. The charges and specifications of the charges were read aloud by the judge advocate.

Question, by the judge advocate: What is your name, rank, and to what vessel are you now attached?

Answer: Stephen A. McCarty is my name; my rank, a lieutenant commander in the U. S. Navy; I am attached to the "Wyoming," but now under orders to the U. S. steamer "Monocacy."

Question, by the judge advocate: Lieutenant Commander Stephen A. McCarty, you have heard the charges and specifications read; you will please state everything within your knowledge bearing on said charges.

Answer: On or about the afternoon of the thirtieth day of May, while we lay in the harbor of Nagasaki, Japan, Mr. Bishop got to drinking. Towards evening he was more or less intoxicated. I do not know what order Mr. Bishop had in regard to going to sea.

On the morning afterward, that is, on or about the morning of the thirty-first day of May, I came on deck about daylight, and I found that Mr. Bishop was not on board ship. By the captain's orders, I took the deck, and "hove short the chain," and reported to the captain I had done so, and by him was ordered to wait and not heave up the ancher until further orders. We waited for from fifteen minutes to half an hour, about which time Mr. Bishop and the marshal of the consulate came off to the ship. When Mr. Bishop came on board, the captain called him one side and had some conversation with him. The captain then called me and informed me that Mr. Bishop was under suspension. We then got under way and went to sea.

Question, by the judge advocate: About what time was this occurrence, and where do you say the "Wyoming" was lying?

Answer: It was about the thirty-first day of May, and the "Wyoming" was lying in the harbor of Nagasaki, Japan.

Question, by the judge advocate: Lieutenant Commander McCarty, was you aware that the "Wyoming" was to sail at daylight on the morning of the thirty-first day of May, one thousand eight hundred and sixty-seven?

Answer, by the witness: I was not officially informed that she was to sail at that time, but I understood she was.

1st question by the court: Who was the officer next in rank to Lieutenant Commander Bishop at the time mentioned in the charges?

Answer: I was.

2nd question by the court: Did Lieutenant Commander Bishop, before going on shore the thirtieth of May, inform you of his intention, or pass the orders in regard to getting the vessel ready for sea by the morning of the 31st?

9

Answer: He reported to me that he was going on shore, but I do not remember that he gave me any orders.

3rd question by the court: Did you see Lieutenant Commander Bishop drink intoxicating liquors on or about the afternoon of the 30th day of May; if so, how often?

Answer: I saw him take a number of drinks on board ship before going on shore.

4th question by the court: Do you think that Lieutenant Commander Bishop, whom you state was somewhat intoxicated on the afternoon of the 30th of May, was in a proper condition to perform his duty?

Answer: I do not.

5th question by the court: Was Lieutenant Commander Bishop intoxicated when he came on board the Wyoming the morning of the 31st of May, 1867?

Answer: I do not know positively that he was.

6th question by the court: Did you receive the accused at the gangway, and notice his condition when he came on board? If yea, what was his condition?

Answer: I was on the bridge (when he came on board), which is immediately forward of the gangway; when the accused came on board, his condition was that of a man who had been intoxicated, and was not yet entirely sober.

Cross-examination:

By the accused: Did my remaining ashore detain the ship? Was not the ship waiting for the marshal? And did I not come on board some time before the marshal?

Answer: I do not know whether your remaining on shore detained the ship or not; I do not know which came first; they came nearly at the same time.

Question by the accused: Were there not several officers left on shore, and while attached to the "Wyoming," in consequence of the ship receiving orders for sea unexpectedly?

Answer: There was one officer so left.

Question by the accused: Was I not able to perform my duty as executive officer of the ship at both times specified?

Answer: On the first time specified, on the 30th of May, you were not; on the second occasion specified, I cannot say positively whether you were or not.

Question by the accused: Were there not several officers drinking with me on the 30th day of May, and had there not been a dinner given on board the "Wyoming"?

Answer: I believe there were some officers on board, drinking, and I think there were some persons on board to dinner.

Question by the accused: In what condition of health was I in at the time specified, and previous to that?

Answer: You had been suffering from asthma for some time. The precise condition of your health at that time I do not remember.

There being no more questions to be put to this witness, his testimony as hereinbefore written, was read aloud to him by the judge advocate, and by the witness acknowledged to have been correctly recorded.

The court was then cleared for deliberation to consider the propriety of detaining Lieutenant Commander McCarty in behalf of the accused, who desired he might be detained, and the court permitted him to do so.

At 12 m. the court took a recess for 30 minutes.

At 12.30 p. m. the court reopened, and Lieutenant GEO. D. B. GLIDDEN, a witness on the part of the prosecution, was called into court and duly sworn.

Question, by the judge advocate: State your name, rank, and to what vessel are you now attached?

Answer: My name is George D. B. Glidden, I am a lieutenant in the U. S. Navy attached to the U. S. steamer "Wyoming," but now under orders to the U. S. steamer "Monocacy."

The charges and specifications of the charges were then read aloud by the judge advocate.

Question, by the judge advocate: Lieutenant Glidden, you have heard read the charges and specifications of the charges preferred against Lieutenant Commander Joshua Bishop. You will state all the knowledge you have which bears upon these charges.

Answer: During the latter part of the day mentioned in the specification, Mr. Bishop was, according to my own convictions, under the influence of liquor. I do not remember to have seen him drink anything. I judged from appearances only. I remember hearing Captain Carpenter give the order to Lieutenant Commander Bishop, as soon as the hands are turned to from supper to unmoor ship and get ready for sea. I went ashore after hearing that. While Mr. Bishop was at dinner the officer of the deck, speaking through the hatch-

way, asked Mr. Bishop if he should go ahead and unmoor ship, the hands having been turned to; I do not remember the answer given by Mr. Bishop.

Question, by the judge advocate: Did Lieutenant Commander Bishop prepare the vessel for sea in obedience to the order of Lieutenant Commander C. C. Carpenter?

Answer: I don't know, sir.

Question, by the judge advocate: Did Lieutenant Commander Bishop go on shore on the afternoon of the 30th day of May, after you heard the order given to him by Lieutenant Commander C. C. Carpenter?

Answer: I met him on shore on the evening of that day.

Question, by the judge advocate: How long did Lieutenant Commander Bishop remain on shore, and at what time did he return to the U. S. steamer "Wyoming"?

Answer: It is my belief that the accused remained on shore all night, and I know returned to the ship shortly after daylight the following morning.

Examination by the court:

Question, by the court: Was Lieutenant Commander Bishop, on the evening of the thirtieth of May, in a proper state to attend to his duty as executive officer of the "Wyoming"?

Answer: He was not.

11 Question, by the court: If the accused was not in a proper state to attend his duty, from what reason or source did it arise?

Answer: Being, I suppose, under the influence of liquor.

Question, by the court: You have stated that you heard Lieutenant Commander Carpenter give Lieutendant Commander Bishop the order to unmoor ship as soon as the hands were turned to from supper; was that order obeyed?

Answer: I do not know that it was.

Question, by the court: When did you leave the ship to go on shore?

Answer: Between half-past five and a quarter to six o'clock.

Question, by the court: Was the ship unmoored before you left the ship?

Answer: I do not know whether it was or not.

Question, by the court: Is it not customary to call the officers on board the Wyoming when all hands are called?

Answer: It is now.

The examination was here closed on the part of the prosecution.

The accused was asked if he wished to question the witness, Lieutenant Glidden, and he replied he did not.

There being no more questions to put to this witness, his testimony as heretofore written down was read aloud to him by the

judge advocate, and by him acknowledged to have been correctly recorded, and he was discharged from further attendance on the court, he being under orders to the U. S. S. "Monocacy," now on the eve of her departure.

Lieutenant Commander CHARLES C. CARPENTER, a witness on the part of the prosecution was called into court, and duly sworn.

By the judge advocate: Please state your name, rank, and to what vessel you are now attached.

Answer: Charles C. Carpenter; a lieutenant commander; commanding the U. S. steamer "Wyoming."

The charges and specifications of the charges were then read aloud by the judge advocate.

Question, by the judge advocate: Lieutenant Commander Carpenter, you have heard read the charges and specifications of the charges preferred against Lieutenant Commander Bishop; please state all knowledge you have which bears upon said charges and specifications.

Answer: On or about the thirtieth day of May last, in the harbor of Nagasaki, Japan, I received an order from the admiral to go to sea at early daylight the next morning. This was on board the "Hartford." When I returned to the Wyoming I was met by Lieutenant Commander Bishop, and the officer of the deck, Mr. Glidden. I then told Lieutenant Commander Bishop to have the vessel ready for sea at early daylight next morning, and to inform the officers that the ship was going to sea. I noticed that Mr. Bishop was intoxicated at the time. I then went on shore, and on my return I sent for Mr. Bishop again in the cabin, and asked him if there were any officers on shore and if he had informed the officers that the ship was going to sea at early daylight; and he replied, there were none on shore, and that they had all been told that the ship was going to sea. I went on board the "Hartford" in the evening and returned about eleven o'clock, and when I returned, the officer of the deck informed me that Lieutenant Commander Bishop had gone on shore.

12 I gave orders for steam at four o'clock, and to have Mr. McCarty called. At three o'clock the next morning I was called by the officer of the deck, who informed me that Mr. Bishop had not returned on board, and at four o'clock I was called; the anchor was hove short, steam was ready and I remained waiting until the United States marshal came on board, as he was to go out with me. About twenty minutes to five o'clock, Lieutenant Commander Bishop came on board, and I asked him why he had remained on shore when I had given orders to be ready for sea at early daylight, and he said that I had not given the order. One of the engineers of the ship and two or three servants were on shore, and when they returned, they informed me that they had permission to go on shore,

and the engineer said he had not been informed that the vessel was going to sea the next morning.

Question, by the judge advocate: What time do you state this occurrence took place, and where was the U. S. steamer "Wyoming" lying?

Answer: It occurred on or about the thirtieth day of May last, and the "Wyoming" was lying in the harbor of Nagasaki, Japan.

Examination by the court:

Question, by the court: At what time was the "Wyoming" unmoored, and under whose superintendence?

Answer: She was unmoored about six o'clock, and by the officer of the deck. I asked the officer of the deck where Mr. Bishop was, and he answered he was at dinner?

Question, by the court: Did you give the accused permission to go on shore during the thirtieth day of May?

Answer: I told him when I first took command that in a secure harbor he need not come to me to go on shore if Mr. McCarty was on board. This I told him as a general rule.

The examination of the witness on the part of the prosecution was here closed. The accused was asked by the judge advocate if he wished to ask any questions of the witness, and he replied, "Yes, sir."

Cross-examination by the accused:

By the accused: Did my remaining on shore detain the ship? Was not the ship waiting for the marshal, and did I not come on board some time before the marshal?

Answer: I think the marshal arrived a few minutes before the accused, but I am not certain.

Question, by the accused: Did you not tell me that you did not expect to sail *to* the morning, when you gave the order to have the ship ready for sea?

Answer: No, sir; I did not. I expected to go to sea at four o'clock in the morning. The marshal was detained; he did not come at the time the consul said he would be on board.

Re-examination by the court:

Question, by the court: When, on your coming from the "Hartford," and as you state in your testimony, you found the accused intoxicated, was he so much intoxicated as to be unfit for duty?

Answer: As it turned out, yes, he was; I did not suspend him or take him from duty because I thought he might get over it.

13 Question, by the court: When you went on board the "Hartford" again and remained until eleven o'clock p. m.,

did you leave the accused in charge of the ship, and was he then in condition to attend to his duty?

Answer: I left the ship about half-past six o'clock, and the accused was at the gangway and in about the same condition; and I thought he was able to attend to the duties of the ship in my absence, and the circumstances of his going on shore and not remembering the orders I had given him, afterward convinced me that he was intoxicated.

Question, by the court: After you had suspended the accused from duty, by whose order was he placed on duty again, and how long after he had been placed under suspension?

Answer: He was placed on duty again by order of the admiral, about twelve hours after he was placed under suspension.

Question, by the court: How was the order given—by signal or otherwise?

Answer: By letter, I think.

Question, by the court: Did you understand that no further proceedings were to be had against the accused when you restored him to duty?

Objection was made to this question and the court was cleared for deliberation upon the propriety of admitting it, and the court was again opened and the question again asked.

Answer: No, I did not. I understood it was to be further investigated, and it was so mentioned in the admiral's letter.

Question, by the court: Can you produce the admiral's order before the court—if yea, will you present it to the court?

Answer: I can and I will.

The examination on the part of the prosecution here closed. The accused desired to ask the witness further questions.

Re-examination by the accused:

By the accused: Did you not give me a verbal order, saying Admiral Bell had ordered that I should be restored to duty, and did you inform me that I was to be only temporarily released?

Answer: I did say the admiral had restored the accused to duty; whether I told him anything more or not, I cannot say.

There being no more questions to put to this witness, his testimony as heretofore written, was read over to him and pronounced by him to be correctly recorded, and he withdrew from the court. Neither the accused nor the prosecution wishing to detain the witness, Lieutenant Commander Stephen A. McCarty, and his ship being ready for sea, he was discharged from further attendance on the court.

At four o'clock p. m. the court adjourned to meet again at ten o'clock to-morrow morning, Saturday, September 7, 1867.

U. S. steamer "Wachusett," Hong Kong harbor, China.

SATURDAY, *September* 7, 1867.

At ten o'clock a. m. the court met pursuant to adjournment.
Present: Commander John C. Febiger, senior member,
Commander R. W. Shufeldt, member,
Commander George E. Belknap,
Lieutenant Commander F. H. Baker,
14 Lieutenant Commander L. A. Beardslee,
Lieutenant Commander F. R. Smith,
Lieutenant Commander F. J. Higginson,
and Passed Assistant Paymaster Samuel T. Browne, the judge advocate.

The accused, Lieutenant Commander Joshua Bishop, and his counsel, Captain James Forney, U. S. Marine Corps, were also present.

The proceedings of yesterday were read by the judge advocate, and approved by the court.

The letter from Rear Admiral H. H. Bell, referred to in the testimony of Lieutenant Commander C. C. Carpenter, given in the proceedings of yesterday, was received and read aloud by the judge advocate; a copy of said letter is herewith appended and marked "E."

Lieutenant CHARLES D. SIGSBEE, a witness on the part of the prosecution, was called into court and duly sworn.

Question, by the judge advocate: State your name, rank and to what vessel you are now attached?

Answer: My name is Charles D. Sigsbee. I am a lieutenant in the U. S. Navy, and I am now attached to the "Ashuelot."

The charges and specifications of the charges preferred against Lieutenant Commander Joshua Bishop were read aloud by the judge advocate, in the presence of the witness.

Examination:

Question, by the judge advocate: Lieutenant Sigsbee, you have heard read the charges and specifications of the charges preferred against Lieutenant Commander Joshua Bishop. You will please state all the knowledge you have which bears upon these charges and specifications.

Answer: On the first specification: On or about the thirtieth day of May, Lieutenant Commander Bishop, then executive officer of the "Wyoming," was drunk during the latter part of the afternoon. On the thirtieth day of May I was officer of the deck from four o'clock in the evening. Lieutenant Commander Bishop neglected to attend to his duty in not coming on deck to unmoor ship when all hands were called. I sent down to the accused to ask him if I should unmoor ship, and he instructed me to do so. Captain Carpenter asked

me why Mr. Bishop was not on deck, and I answered that Mr. Bishop had sent word to me to unmoor ship. I do not know whether the captain gave Mr. Bishop orders to have the vessel ready for sea or not. It was generally understood that we were to go to sea the next morning. The captain seemed to notice many things which should have been attended to towards getting the vessel ready for sea, and requested me to attend to them.

Mr. Bishop was out of the ship on the night of the thirtieth day of May, and I do not know what time he returned on board on the thirty-first day of May.

Question, by the judge advocate: At what time do you say that these occurrences took place, and where was the "Wyoming" lying?

Answer: On the thirtieth and thirty-first days of May last, and the "Wyoming" was lying in the harbor of Nagasaki, Japan.

Examination by the court:

Question, by the court: By whose order was all hands
15 called to unmoor ship, on the afternoon of the thirtieth day of May last?

Answer: I do not know positively. I think the captain sent me the order, and I sent down to Mr. Bishop.

The examination of the witness was closed here on the part of the prosecution.

The judge advocate then asked the accused if he wished to ask the witness any questions, and the accused replied "Yes."

Cross-examination by the accused:

Question by the accused: You say that several things had not been done which Lieutenant Commander Carpenter noticed, and ordered you to have them attended to; will you please state what they were?

Answer: The only thing I can remember now is the unshipping of the gangway ladder; I think getting the lower booms alongside was another. There were several things noticed at different times.

Question by the accused: Was it Captain Bankhead's order to put the ship under sailing orders some time previous to getting under way, while he was in command of the ship; was it not always the rule to send the officers a messenger boy that the ship would sail at such a time?

Answer: I do not remember.

Question by the accused: Was it the custom when all hands were called to unmoor ship to call the officers, until after the occurrence on the morning of the thirty-first of May?

Answer: I do not remember when the change in the custom took place; under Captain Bankhead it was not required for anyone but the executive officer and officer of the deck to be called. Captain Carpenter gave the order for all officers who had deck duty to be

called. It had always been the custom for the executive officer to take the deck when unmooring ship.

Question by the accused: Was not the order to go to sea on the morning of the thirty-first of May a very unexpected one, and were not several officers and a number of the crew left on shore in consequence?

Answer: I do not think the order was unexpected. I do not know that any of the crew were ashore over time. There was an officer left on shore when we sailed.

Question by the accused: Was it not always the custom for me to leave the accommodation ladder shipped until just before heaving up the last anchor?

Answer: Generally it was left until just before getting up the last anchor; I do not think there was any rule in regard to it.

Question by the accused: Has it not been a frequent occurrence for me to come on deck suffering from the asthma?

Answer: The accused used to come on deck suffering from some sickness. I do not know whether it was the asthma or not.

Re-examination by the court:

Question, by the court: Did Lieutenant Commander Bishop make his appearance on deck during your watch on the evening of the thirtieth of May, 1867, and give any orders towards getting the vessel ready for sea?

16 Answer: The accused came on deck and gave orders. He gave orders when anyone asked him for them.

There being no more questions to ask this witness, his testimony, as hereinbefore written, was read aloud by the judge advocate, and pronounced by the witness to be correctly recorded, and the witness withdrew from court.

The court here took a recess for half an hour. At half-past twelve o'clock the court again met. Acting Ensign CHARLES R. HASKINS, a witness on the part of the prosecution, was called into court and duly sworn.

Question, by the judge advocate: State your name, rank and to what vessel you are now attached?

Answer: Charles R. Haskins; acting ensign; attached to the U. S. steamer "Wyoming."

The charges and specifications of the charges were read aloud by the judge advocate.

Question, by the judge advocate: Acting Ensign Charles R. Haskins, you have heard read the charges and specifications of the charges preferred against Lieutenant Commander Joshua Bishop. You will state all the knowledge you have bearing upon the said charges and specifications.

Answer: On the afternoon of the thirtieth day of May last, or in the evening, Lieutenant Commander Bishop was intoxicated on board the U. S. steamer "Wyoming." I know nothing as to what the orders to the accused were. I know that he went on shore in the evening, I think, between the hours of eight and nine. I do not know when he returned on board.

Question, by the judge advocate: Acting Ensign Charles R. Haskins, when do you say these occurrences took place, and where was the "Wyoming" lying?

Answer: On the thirtieth of May last, and the "Wyoming" was lying in the harbor of Nagasaki, Japan.

Question, by the judge advocate: Acting Ensign Charles R. Haskins, were you informed that the U. S. steamer "Wyoming" was to go to sea at daylight on the morning of the thirty-first day of May last?

Answer: I think I had been, but cannot swear positively as to it.

Question, by the judge advocate: Acting Ensign Charles R. Haskins, was it generally understood among the officers of the U. S. steamer "Wyoming" on the thirtieth day of May last that said steamer was to go to sea at daylight on the morning of the thirty-first day of May last?

Answer: It was.

Question, by the judge advocate: Acting Ensign Charles R. Haskins, was the fact of the going to sea of the U. S. steamer "Wyoming" on the morning of the thirty-first day of May last at all unexpected by the officers?

Answer: I do not recollect.

Question, by the judge advocate: Did Lieutenant Commander Bishop take the usual steps on the evening of the thirtieth day of May last to place the U. S. steamer "Wyoming" in readiness for going to sea at daylight on the morning of the thirty-first day of May last?

Answer: I do not recollect.

17 The testimony of this witness was here closed on the part of the prosecution.

The judge advocate then asked the accused if he desired to ask the witness any questions, and he replied, "I do."

Cross-examination:

Question by the accused: How do you know I was intoxicated?

Answer: I judged by his general conduct and by the fact that I had seen him drink large quantities of wine during the afternoon.

Question by the accused: Was the vessel ready for sea at daylight the morning of the thirty-first of May?

Answer: I do not know.

There being no more questions to ask this witness, his testimony as hereinbefore written was read aloud by the judge advocate and

pronounced by the witness to have been correctly recorded, and the witness withdrew from the court.

The case was here closed on the part of the prosecution.

The judge advocate asked the accused if he had any witnesses he wished to introduce in behalf of the defense, and he replied he had none. The accused asked time to prepare his defense and the court adjourned until ten o'clock Monday morning, September 9, 1867.

U. S. steamer "Wachusett," Hong Kong harbor, China.

10 O'CLOCK A. M., SEPTEMBER 9, 1867.

At 10 o'clock a. m. the court met pursuant to adjournment.

Present: Commander John C. Febiger, senior member,
Commander R. W. Shufeldt, member,
Commander Geo. E. Belknap, member,
Lieutenant Commander F. H. Baker, member,
Lieutenant Commander L. A. Beardslee, member,
Lieutenant Commander F. R. Smith, member,
Lieutenant Commander F. J. Higginson, member,
and Passed Assistant Paymaster Samuel T. Browne the judge advocate.

The accused, Lieutenant Commander Joshua Bishop, and his counsel, Captain James Forney, U. S. Marine Corps, were also present.

The proceedings of the court on Saturday, the 7th inst., were read aloud by the judge advocate, and approved by the court. A written statement of the defense was, by the desire of accused, submitted to the court.

The court was cleared for deliberation upon the matter of considering and admitting the statement that the accused has presented in his defense.

The court decided to admit the defense which the accused submitted and which is hereunto appended and marked "7."

The court was again opened and the accused, Lieutenant Commander Joshua Bishop, and his counsel, Captain James Forney of the U. S. Marine Corps, came into court.

The accused was informed by the court that the court had decided to admit the statement which the accused had submitted. The statement of the accused as above referred to was then read aloud by the counsel for the accused.

The court was then closed for deliberation upon the finding
18 in the case of Lieutenant Commander Joshua Bishop, charged as herein stated in charges and specifications preferred by Rear Admiral H. H. Bell, commanding U. S. Asiatic squadron, and a copy of which charges and specifications is hereunto appended and marked "C."

The judge advocate then read aloud such parts of the testimony as the court desired to hear.

The presiding officer having ascertained that every member was

ready to give his opinion. The judge advocate had in consecutive order the specifications to each charge, and also each charge, and addressing each member, commencing with the junior member, said:

From the evidence in the matter now before you, how say you of the specifications and charges against Lieutenant Commander Joshua Bishop, said specifications and charges preferred by Rear Admiral H. H. Bell, commanding U. S. Asiatic squadron. Is the accused "guilty or not guilty?"

Answer, by the court: Of the specification of the first charge, Proven!

Of the first charge, Guilty!

Of the specification of the second charge, Proven!

Of the second charge, Guilty!

and the court do therefore sentence the accused Lieutenant Commander Joshua Bishop to be dismissed from the naval service of the United States.

COMDR. JOHN C. FEBIGER, *Sr. Member.*
COMDR. R. W. SHUFELDT, *Member.*
COMDR. GEO. E. BELKNAP, *Member.*
LT. COMDR. F. H. BAKER, *Member.*
LT. COMDR. L. A. BEARDSLEE, *Member.*
LT. COMDR. FRED. R. SMITH, *Member.*
LT. COMDR. F. J. HIGGINSON, *Member.*
PASSED ASSISTANT PAYMASTER SAMUEL T. BROWNE, *Judge Advocate.*

These proceedings of a naval general court-martial convened by my order for the trial of Lieutenant Commander Joshua Bishop, United States Navy, are hereby respectfully forwarded and submitted to the honorable Secretary of the Navy for the action of His Excellency the President of the United States, article 19th of an act for the better government of navy, approved July 17, 1862.

H. H. BELL,
Rear Admiral, Commanding U. S. Asiatic Squadron.

U. S. S. Hartford, Hong Kong, September 10, 1867.

Precept for a Naval General Court-martial.

A.

U. S. flagship "Hartford," Hong Kong, China.

SEPTEMBER 4, 1867.

By virtue of authority contained in the act of Congress, entitled An act for the better government of the Navy of the United States, approved July 17, 1862, a naval general court-martial is hereby ordered to convene on board of the United States steamer "Wachu-

sett" in the harbor of Hong Kong, China, on Friday, the sixth day of September, anno Domini one thousand eight hun-
19 dred and sixty-seven, at 10 o'clock in the forenoon, or as soon thereafter as practicable, for the trial of Joshua Bishop, a lieutenant commander in the United States Navy, and of such other persons as may be legally brought before it.

The court will be composed of the following officers, that is to say:

Commander John C. Febiger, senior member,
Commander R. W. Shufeldt,
Commander Geo. E. Belknap,
Lt. Commander F. H. Baker,
Lt. Commander L. A. Beardslee,
Lt. Commander F. R. Smith,
Lt. Commander F. J. Higginson;

and Passed Assistant Paymaster Samuel T. Browne is hereby appointed the judge advocate.

H. H. BELL,
Rear Admiral, Commanding United States Asiatic Squadron.

United States flagship "Hartford."

HONG KONG, *September* 4, 1867.

Passed Assistant Paymaster Sam'l T. Browne, U. S. S. "Ashuelot."

SIR: You are hereby appointed judge advocate of a naval general court-martial, ordered to convene on board the U. S. S. "Wachusett," on Friday, the 6th of September, 1867, at 10 o'clock in the forenoon, and you will report at the time and place, and for the duty specified, to Commander J. C. Febiger, senior member of the court.

The charge and specification of charge preferred against Lieutenant Commander Joshua Bishop of the U. S. S. "Wyoming," are herewith enclosed, and you will present them to the court upon its organization.

You will please acquaint yourself with the merits of the case without delay.

I am, sir, very respectfully, H. H. BELL,
Rear Admiral, Commanding U. S. Asiatic Squadron.

Reported September 6, at 10 a. m.

JOHN C. FEBIGER,
Comm'd'r, Sr. Officer.

C.

Charges and specifications of charges preferred by Rear Admiral Henry H. Bell, commanding U. S. Asiatic squadron, against Lieutenant Commander Joshua Bishop, of the United States Navy.

Charge 1st. Drunkenness.

Specification: In this, that Joshua Bishop, a lieutenant commander in the Navy of the United States, attached to and serving on board

of the United States steamer Wyoming as executive officer, was, on or about the thirtieth day of May, anno Domini one thousand eight hundred and sixty-seven, intoxicated on board of the said United States steamer Wyoming, then lying in the harbor of Nagasaki, Japan.

Charge 2nd. Neglect of duty.

Specification: In this, that the said Lieutenant Commander Joshua Bishop, of the United States Navy, attached to and serving on board of the United States steamer Wyoming as executive officer, then lying in the harbor of Nagasaki, Japan, on or about the 30th (thirtieth) day of May, anno Domini one thousand eight hundred and sixty-seven, was ordered by his commanding officer, Lieutenant Commander Charles C. Carpenter, to have the said United States steamer Wyoming ready for sea by daylight on the morning of the thirty-first day of May, anno Domini one thousand eight hundred and sixty-seven, and that the said Lieutenant Commander Joshua Bishop did neglect to obey the aforesaid order, and did go on shore, from whence he did not return until after daylight on the morning of the said thirty-first day of May, one thousand eight hundred and sixty-seven.

H. H. BELL,
Rear Admiral, Commanding U. S. Asiatic Squadron,
U. S. Flagship "Hartford."

Shanghai, China, June 21, 1867.

Witnesses:
LIEUT. COMDR. CHAS. C. CARPENTER.
LIEUT. COMDR. S. H. McCARTY.
LIEUT. CHAS. D. SIGSBEE.
LIEUT. GEO. D. B. GLIDDEN.
ENSIGN CHAS. R. HASKINS.

D.

Copy of Entries Made in the Log Book of the U. S. Steamer Wyoming, May 31, 1867.

From 4 to 8 a. m.—Lieut. Comdr. Joshua Bishop was suspended from duty by order of Lieut. Comdr. C. C. Carpenter.

From 4 to 8 p. m.—At 6.40 p. m. Lieut. Comdr. Bishop was restored to duty by order of Rear Admiral H. H. Bell.

I certify the foregoing to be a correct copy of entries on the log of the U. S. steamer "Wyoming," May 31, 1867, and copied from said log by myself.

SAMUEL T. BROWNE,
Passed Ass't Paymaster, Judge Advocate.

E.

U. S. flagship "Hartford."

NAGASAKI, JAPAN, *May* 31, 1867.

Lieut. Comm'd'r C. C. Carpenter, comm'd'g U. S. S. "Wyoming," Nagasaki.

SIR: Your communication of this date reporting Lieutenant Commander Bishop to me is received.

You will restore Lieutenant Commander Bishop to duty to await an opportunity for time to investigate the case.

I am, sir,

Very respectfully, H. H. BELL,

Rear Admiral, Commanding U. S. Asiatic Squadron.

I certify that the above is a correct copy of a letter received by myself from Rear Admiral H. H. Bell.

C. C. CARPENTER,

Lieut. Comm'd'r, Commanding U. S. S. "Wyoming."

F.

Defense of Lieut. Commander Joshua Bishop, of the U. S. steamer "Wyoming," against charges preferred against him by Rear Admiral H. H. Bell, commanding U. S. Asiatic squadron.

Mr. President and gentlemen of the court:

I have the honor respectfully to present the following defense:

21 Of the first charge of "drunkenness" I have only to state that on the evening specified in the charge and specification, I had been dining with a number of officers from the different vessels in the squadron, and several American residents of Nagasaki, Japan, and being executive officer of the ship, I was obliged to entertain them, and more particularly when they were my own guests, but I cannot see in what way I exhibited signs of intoxication which rendered me unfit for the performance of duty.

Lieutenant Commander Carpenter stated that when he left the "Wyoming" for the "Hartford," that I was under the influence of liquor, and then, directly afterwards, states that he went away, leaving the ship in my charge, and that I was on deck at the gangway, and that he did not think it necessary to place me under suspension, because he then thought I was able to attend to my duties.

Lieutenant Glidden also testified I (Lieutenant Commander Bishop) was on deck, at the gangway, when Lieutenant Commander Carpenter left the ship. I cannot understand why he should leave

the ship in my charge if I was so much under the influence of liquor as to render me unfit for duty.

Of the second charge:

At 5.30 p. m. Lieutenant C. D. Sigsbee came to the wardroom, hatch, and said that the hands were turned to, and asked if he should go ahead and unmoor ship. I was then at dinner. I told him to go ahead and unmoor, and I think that I also said, get the ship ready for sea. I did not go on deck myself, not because I was unable to do so, but because I had guests on board, and on several occasions, while Captain John P. Bankhead was in command, I had not taken the deck when I had guests on board, and on such occasions the officer of the deck took charge.

Lieutenant Commander Carpenter states that he sent for me in the cabin and asked me if there were any men or officers ashore, and that I said "No." We had given special liberty to some men a few days previously, and one or two had not returned on time. I was under the impression that it was these he referred to, as I knew that a number of officers were then ashore. I did not send for them, as I did not so understand his order; and while Captain Bankhead was in command of the "Wyoming," it was not customary to send for officers on shore when orders were given to get the ship ready for sea at daylight.

It was evidently not generally understood by the officers of this vessel on shore that the ship would go to sea at daylight; but that the order was a very unexpected one, also that the officers on board were aware that the vessel had orders for sea in the morning.

Lieutenant Sigsbee says that Lieutenant Commander Carpenter noticed several things which had not been attended to, and when questioned mentions only the accommodation ladder. He states, afterwards, that it was not customary to unship it until just before heaving up the last anchor.

I left the ship on the evening of the 30th of May, 1867, and after I had received the report of the boatswain that everything was ready for getting under way. At the time I left the ship there had been no order given to get steam up and I did not leave the ship until after 8 p. m. Lieut. Comdr. S. A. McCarty states that I told him I was going ashore. Lieut. Comdr. Carpenter states distinctly that 22 it was not necessary to obtain his permission when I desired to leave the ship.

I left Lieut. Comdr. McCarty on board when I left the ship in the evening. I returned to the ship in the morning in time to get her under way, and I did not detain her one moment. I returned to the vessel before the U. S. marshal came on board. The ship waited for the U. S. marshal and not for me.

If I had not been on board in time the ship would have gone to sea without me.

Mr. President and members of the court, indeed I cannot see in

what way I committed myself on the first charge, or neglected my duty on the second.

At the time referred to, I had been suffering many days from a severe attack of the asthma, which completely unfitted me at times to attend the duties of the ship. As Lieut. Comdr. McCarty and Lieut. Sigsbee both mention, in the evidence, that I had been suffering from sickness for some time previous to the time specified in the charge.

Finally, I desire to call the attention of the court that this trial has taken me entirely by surprise. I was given to understand by Lieut. Comdr. Carpenter that no further proceedings would be taken against me. I have never seen, nor even heard of a letter from Admiral Bell in reference to the subject, and that this matter should be now brought up on the eve of the ship's departure for home I consider very severe upon me, and I hope that the court will take the matter into consideration.

Respectfully submitted,

JOSHUA BISHOP,
Lieutenant Commander.

23 II.—*Traverse. Filed Feb'y* 10, 1903.

In the Court of Claims of the United States, December Term, A. D. 1902.

JOSHUA BISHOP
vs.
THE UNITED STATES. } No. 21914.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

[Endorsed:] No. 21914 Bishop *vs.* The United States. General traverse. L. A. Pradt, Assistant Attorney General.

24 III.—*Findings of Fact and Conclusion of Law and Opinion of the Court. Filed March* 23, 1903.

JOSHUA BISHOP
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant is a citizen of the United States, to wit, an officer on the retired list of the United States Navy. The following is his military record:

1854, September 20, appointed an acting midshipman.

1858, June 15, warranted midshipman, from June 11, 1858.

1861, January 28, warranted passed midshipman, from January 19, 1861.

1861, February 28, warranted master, from February 23, 1861.

1861, August 14, commissioned lieutenant, from April 19, 1861.

1865, April 1, commissioned lieutenant-commander, from March 3, 1865.

1868, February 8, dismissed pursuant to sentence of general court-martial.

1871, March 8, commissioned lieutenant-commander, from March 1, 1871.

1888, March 8, commissioned commander, from August 25, 1887.

1896, December 31, transferred to the retired list, section 1453, Revised Statutes.

II.

On the 5th day of December, 1867, claimant was a lieutenant commander in the Navy, attached to the U. S. S. *Wyoming* as executive officer, said vessel being commanded by Lieut. Commander C. C. Carpenter, and comprising a part of the United States Asiatic squadron, under the command of Rear-Admiral H. H. Bell, then in the harbor of Hong Kong, China. On that day the following entry was made in the log book of the *Wyoming:*

"From 4 to 8 a. m.

"Lt. Comdr. Joshua Bishop placed under arrest to await trial by court-martial, and served with a copy of charges, by order of Rear-Admiral H. H. Bell, comdg. U. S. Asiatic squadron.

"E. F. CRAWFORD, *Mate.*"

25 III.

On September 5, 1867, a court-martial was convened on board of the U. S. S. *Wachusetts*, in Hongkong harbor, for the trial of Lieut. Commander Joshua Bishop, executive officer of the U. S. S. *Wyoming*, pursuant to the following order:

Precept for a Naval General Court-martial.

U. S. flagship "Hartford."

KONGKONG, CHINA, *September 4th*, 1867.

By virtue of authority contained in the act of Congress entitled An act for the better government of the Navy of the United States, approved July 17th, 1862, a naval general court-martial is hereby ordered to convene on board of the United States steamer *Wachusett*, in the harbor of Hongkong, China, on Friday, the sixth day of September, anno Domini one thousand eight hundred and sixty-seven, at ten o'clock in the forenoon, or as soon thereafter as practicable, for the trial of Joshua Bishop, a lieut. commander in the United States Navy, and of such other persons as may be legally brought before it.

The court will be composed of the following officers—that is to say:

Commander John C. Febiger, senior member.
Commander R. W. Shufeldt.
Commander Geo. E. Belknap.
Lt. Commander F. H. Baker.
Lt. Commander L. A. Beardslee.
Lt. Commander F. R. Smith.
Lt. Commander F. J. Higginson.

And Passed Assistant Paymaster Samuel T. Brown is hereby appointed the judge-advocate.

H. H. BELL,
Rear-Admiral, Commanding United States Asiatic Squadron.

IV.

On said date September 5, 1867, claimant was arraigned and tried on the following charges and specifications:

Charges and specifications of charges preferred by Rear-Admiral Henry H. Bell, commanding U. S. Asiatic squadron, against Lieutenant-Commander Joshua Bishop, of the United States Navy.

CHARGE 1ST.—*Drunkenness.*

Specification.

In this, that Joshua Bishop, a lieutenant-commander in the Navy of the United States, attached to and serving on board of the United

States steamer *Wyoming* as executive officer, was, on or about the thirtieth day of May, anno Domini one thousand eight hundred and sixty-seven, intoxicated on board of the said United States steamer *Wyoming*, then lying in the harbor of Nagasaki, Japan.

26 CHARGE 2D.—*Neglect of Duty.*

Specification.

In this, that the said Lieutenant-Commander Joshua Bishop, of the United States Navy, attached to and serving on board of the United States steamer *Wyoming* as executive officer, then lying in the harbor of Nagasaki, Japan, on or about the 30th (thirtieth) day of May, anno Domini one thousand eight hundred and sixty-seven, was ordered by his commanding officer, Lieutenant-Commander Charles C. Carpenter, to have the said United States steamer *Wyoming* ready for sea by daylight on the morning of the thirty-first day of May, anno Domini one thousand eight hundred and sixty-seven, and that the said Lieutenant-Commander Joshua Bishop did neglect to obey the aforesaid order, and did go on shore, from whence he did not return until after daylight on the morning of the said thirty-first day of May, one thousand eight hundred and sixty-seven.

H. H. BELL,
Rear-Admiral, Commdg. U. S. Asiatic Squadron.

U. S. flagship Hartford, Shanghai, China, June 21st, 1867.

Witnesses:
LIEUT. COMMDR. CHAS. C. CARPENTER.
LIEUT. COMDR. S. A. McCARTY.
LIEUT. CHAS. D. SIGSBEE.
LIEUT. GEO. D. B. GLIDDEN.
ENSIGN CHAS. R. HASKINS.

On said charges and specifications said court-martial found as follows:

Of the specification of the first charge, "Proven."
Of the first charge, "Guilty."
Of the specification of the second charge, "Proven."
Of the second charge, "Guilty."

And the court do therefore sentence the accused, Lieutenant-Commander Joshua Bishop, to be dismissed from the naval service of the United States.

COMDR. JNO. C. FEBIGER, *Sr. Member.*
COMDR. R. W. SHUFELDT, *Member.*
COMDR. GEO. C. BELKNAP, *Member.*
LT. COMDR. F. H. BAKER, *Member.*
LT. COMDR. L. A. BEARDSLEE, *Member.*
LT. COMDR. FRED. R. SMITH, *Member.*
LT. COMDR. F. J. HIGGINSON, *Member.*
PASSED ASSISTANT PAYMASTER SAMUEL T. BROWNE,
Judge-Advocate.

These proceedings of a naval general court-martial convened by my order, for the trial of Lieutenant-Commander Joshua Bishop, United States Navy, are hereby respectfully forwarded and submitted to the honorable Secretary of the Navy, for the action of
27 His Excellency the President of the United States, article 19th of an act for the better government of the aavy approved July 17th, 1862.

H. H. BELL,
Rear-Admiral, Commanding U. S. Asiatic Squadron.

U. S. S. Hartford, Hongkong, September 10th, 1867.

V.

The following action was taken on the findings of said court-martial:

Brief in the case of Lieutenant-Commander Joshua Bishop, U. S. N., tried by naval general court-martial, September 9, 1867, on board the U. S. S. "Wachusett," by order of Rear-Admiral H. H. Bell, comdg. Asiatic squadron.

Charge 1st. Drunkenness.

Specification. May 30, 1867, being attached to and serving on board the U. S. S. *Wyoming*, then in the harbor of Nagasaki, Japan, as executive officer of said vessel, was intoxicated.

Charge 2d. Neglect of duty.

Specification. May 30, 1867, having been ordered by the commanding officer of said vessel, Lieut. Comdr. C. C. Carpenter, to have the said U. S. S. *Wyoming* ready for sea by daylight on the morning of May 31, 1867, did neglect to obey the aforesaid order, and did go on shore, from whence he did not return until after daylight on the morning of May 31, 1867.

Plea: (Stood mute.) Not guilty. Finding: Guilty (of all).

Sentence: "To be dismissed from the naval service of the United States."

The evidence in the case is positive and clear, and the findings of the court sustained thereby. Lieut. Comdr. Bishop produces no witnesses in his behalf, and the statement made by him to the court is lame throughout. There is no recommendation by the court for clemency.

The sentence of the court is just and proper.

Case No. 4688, vol. 3., p. 27.

Lieutenant-Commander Joshua Bishop, U. S. N.

Tried Sept. 9, 1867, by naval general court-martial, per order of Rear-Admiral H. H. Bell, U. S. N., comdg. Asiatic squadron.

NAVY DEPT., *Dec.* 3, 1867.

Respectfully submitted to His Excellency the President for his action, in accordance with article 19 of "An act for the better government of the navy," approved July 17, 1862.

GIDEON WELLES,
Secretary of the Navy.

Approved:

ANDREW JOHNSON.

Dec. 3d, 1867.

Dismissed Feb'y 8, 1868. Letters to Mr. Joshua Bishop and 4th Auditor.

28 On February 8, 1868, the following letter was addressed to claimant and was duly received by him:

NAVY DEPARTMENT,
WASHINGTON, *February* 8, 1868.

SIR: The naval general court-martial before which you were tried September 9, 1867, found you guilty of the charges preferred against you, and sentenced you "to be dismissed from the naval service of the United States." The sentence of the court in your case having been approved by the President, you are hereby dismissed from the naval service of the United States, and from this date you will cease to be regarded as an officer in the United States Navy.

Respectfully,

G. WELLES,
Secretary of the Navy.

Mr. Joshua Bishop, late lieutenant-commander, U. S. Navy, navy yard, Boston, Mass.

VI.

The claimant had no knowledge or information of the order of Rear-Admiral H. H. Bell, dated May 31, 1867, being "Exhibit E" in the court-martial proceedings, set out in claimant's petition, until the hearing.

Claimant received no pay as an officer from February 8, 1868, the date of his dismissal from the service, until March 10, 1871. The claimant received the order from Rear-Admiral H. H. Bell, set out in claimant's petition. The claimant was not furnished by his commanding or any other officer at the time of claimant's suspension, May 31, 1867, or on September 5, 1867, when claimant was arrested for trial, with a copy of the communication and the order marked "Exhibit E" of claimant's petition, or of charges against claimant upon which his suspension from duty was predicated, nor was claimant called upon at any time for a statement or list of persons whom he might wish to have relative to them.

On May 31st the following entry on the log appears:

"From 4 to 8 a. m.

"Lieutenant-Commander Joshua Bishop was suspended from duty by order of Lt. Commander C. C. Carpenter.

"GEORGE B. GLIDDEN, *Master.*

"From 6 to 8 p. m.

"At 6.40 Lt. Comdr. Joshua Bishop was restored to duty by order of Rear-Admiral H. H. Bell.

"GEORGE B. GLIDDEN, *Master.*"

VII.

During the month of March, 1871, the following correspondence took place between the claimant and the Secretary of the Navy:

WASHINGTON CITY, D. C., *March 9th*, 1871.

Hon. Geo. M. Robeson, Secretary of the Navy, Washington, D. C.

SIR: I have the honor to acknowledge the receipt of my commission as a lieutenant-commander on the active list of the
29 United States Navy, bearing date of March 1st, 1871, and respectfully signify my acceptance of the same, and hereby return the oath of office properly filled up.

In accepting this commission I would respectfully inform you that I do not voluntarily surrender my claim to the effect that I have, up to the present time, been a lieutenant-commander in the navy by virtue of a commission dated March 3rd, 1865, and that I have never been legally deprived of said commission.

I have the honor to be, sir, very respectfully, your obe't servant,

JOSHUA BISHOP,
Lt. Comm'd'r, U. S. N.

NAVY DEPARTMENT,
WASHINGTON, D. C., *March* 18, 1871.

SIR: Your letter of the 9th instant, acknowledging the acceptance of a commission as a lieutenant-commander in the navy, coupled with certain conditions, has been received.

You are informed that the department declines to receive such an acceptance.

It must be unconditional and disconnected from any other matter.

The acceptance is herewith returned.

Respectfully, GEO. M. ROBESON,
Secretary of the Navy.

Mr. Joshua Bishop, Turnback, Missouri.

TURNBACK, MO., *March* 27, 1871.

SIR: I have the honor to acknowledge the receipt of your letter of March 18th, 1871, returning my letter of acceptance of a commission as a lieutenant-commander in the United States Navy.

I respectfully comply with the requirements of the department, and return herewith a letter of acceptance in lieu of the one returned to me.

My oath of office having been retained in the department, I presume it is not required that I should send a second one.

I have the honor to be, sir, very respectfully, your obedient servant,

JOSHUA BISHOP,
Lt. Com., U. S. N.

Hon. George M. Robeson, Secretary of the Navy, Washington, D. C

WASHINGTON, *March 9th*, 1871.

SIR: I have the honor to acknowledge the receipt of commission as lieutenant-commander in the United States Navy (active list), dated March 1st, 1871, and hereby inform the department that I accept the commission, and return the oath of office required in such cases, duly sworn to and certified.

I am, very respectfully and gratefully, your obedient servant,

JOSHUA BISHOP,
Lt. Com., U. S. N.

Hon. Geo. M. Robeson, Secretary of the Navy, Washington, D. C.

30 VIII.

Had the claimant's services been continuous in the navy he would be entitled to receive with his claim for pay from September, 1867, to February, 1868, more than $3,000.

IX.

The claimant was detached from the U. S. S. *Wyoming* on September 12, 1867, and ordered to report for passage to the United States on the U. S. S. *Wyoming*, and that upon his arrival to report in person to the honorable Secretary of the Navy. In accordance with that order he set sail for the United States, and reported in writing to the Secretary of the Navy on the 9th of February, 1868, and then and there received this order of dismissal, as shown therein.

X.

Claimant in Account with the United States, Showing Claim and the Amounts Received by Him on such Claims.

Claims:

September 13, 1867, to January 31, 1868, $2,343, sea pay, 141 days	$905.11
One-third additional, same period	301.70
	1,206.81
Less tax at 5 per cent	41.03
	1,165.78

Received:			
September 13, 1867, to January 31, 1868, $1,875, shore pay, 141 days	724.30		
One-third additional, same period	241.43		
	965.73		
Less tax at 5 per cent	28.97		
		936.76	
			$229.02
2. Claims:			
February 1, 1868, to February 3, 1868, $2,343, sea pay, 3 days		19.26	
One-third additional, same period		6.42	
		25.68	
Less tax at 5 per cent		.87	
			24.81
Received:			
February 1, 1868, to February 3, 1868, $1,500, leave pay, 3 days	12.33		
One-third additional, same period	4.11		
	16.44		
Less tax at 5 per cent	.41		
		16.03	
			8.78
3. Claims:			
February 4, 1868, to February 8, 1868, $1,875, shore duty pay, 5 days		25.68	
One-third additional, same period		8.56	
		34.24	
Less tax at 5 per cent		1.03	
		33.21	
31 Received:			
February 4, 1868, to February 8, 1868, $1,500, leave pay, 5 days	$20.55		
One-third additional, same period	6.85		
	27.40		
Less tax at 5 per cent	.68		
		$26.72	
			6.49

4. Claims:

February 9, 1868, to June 30, 1870, $1,875, shore pay, 2 years and 142 days		4,479.44	
One-third additional, same period		1,493.15	
		5,972.59	
Less tax at 5 per cent		179.18	
		5,793.41	

Claims:

July 1, 1870, to March 9, 1871 (paid from March 10, 1871, inclusive), $2,600, shore pay, two-fifths years, 252 days	1,795.07		
Less tax at 5 per cent. to July 31, 1870	6.80		
		1,788.27	
			7,581.68
			7,825.97

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant's petition be dismissed.

WELDON, J., delivered the opinion of the court:

The petitioner claims pay as an officer in the United States Navy from February 9, 1868, to March 9, 1871, as lieutenant-commander, and also sea pay from September 13, 1867, to February 8, 1868.

The suit is prosecuted under the provisions of an act of Congress approved on the 6th day of June, 1900, which in substance provides that the alleged items of pay due and unpaid to claimant for services as lieutenant-commander in the United States Navy between the dates of September 13, 1867, and March 9, 1871, be referred to the Court of Claims. Jurisdiction is conferred on the court to try the case, and that the statute of limitation shall not apply thereto, with the right of appeal to either party. In pursuance of the said statute the claimant filed a petition claiming pay as lieutenant-commander between the said periods.

The claimant, as shown by the findings, entered the navy in the year 1854, and continued therein, being promoted from time to time, until February 8, 1868, when he was dismissed, pursuant to the sentence of a general court-martial. On March 8, 1871, he was again commissioned as lieutenant-commander as of March 1, 1871, and after being promoted in August, 1887, was in December, 1896, transferred to the retired list.

The claim is founded upon an alleged illegality of the court-mar-

tial, its proceedings, the consequent dismissal of the claimant, and a balance of pay from September to February.

The main issue involved in this proceeding is, therefore, the question whether the court-martial was legal in its organization
32 and the proceedings which resulted in the dismissal of claimant were in accordance with law.

The contention of counsel for claimant as to the construction of the statute is, that it intends more than the mere waiver of the statute of limitations, and that by the terms of the statute the claimant is "admitted to be a lieutenant-commander during the time referred to in the private act."

The defendants' counsel insists that nothing is admitted in the statute in favor of the claim; that the only effect of the act is that the statute of limitation is removed, and therefore the demand of the claimant is to be determined upon the same basis of legal right as if the suit had been brought within the period of six years from the time the cause of action accrued. If the dismissal of the claimant was illegal, the statute would commence to run, as to the alleged illegal dismissal, on the 8th day of February, 1868, and as to increase, September, 1867, and would have expired long before the petition was filed.

By the terms of the law giving the court jurisdiction, the claim of Joshua Bishop, "for alleged items of pay due and unpaid to him for services as lieutenant-commander in the United States Navy," is submitted to the court for adjudication.

The statute, by its terms, does not waive any of the legal rights of the defendants except the statute of limitation, and its only effect is to place the claimant in such a condition as that he may have his claim adjudicated according to law upon the same basis as if the suit had been brought within the statutory period of six years.

The phrase in the statute "lieutenant-commander" is simply the expression of a description of the service, which it is alleged the claimant rendered, without any intention to admit or concede that during the period of his alleged service he was in law or in fact a commander in the naval service during the time of his dismission.

The legal effect of the statute, therefore, is to confer jurisdiction on the court by the removal of the statute of limitation, the court having jurisdiction of the subject-matter of the claim.

The claimant by his counsel contends that he is entitled to pay as lieutenant-commander during the entire period from September, 1867, to March, 1871, when he was reappointed in the navy, as a lieutenant-commander, and this contention is based upon the dismissal of the claimant, founded upon the sentence of an alleged illegal court-martial, the illegal proceedings of such court-martial, and the failure to pay claimant what he was entitled to from September, 1867, to February, 1868. It is also contended that the proceedings of the court-martial were not reviewed and approved by the President and were not approved by the officer who ordered the court. The substance of the contentions by the claimant is that the

proceedings by which he was dismissed from the navy were not legal, and therefore he is entitled to pay for the period during which he was in fact out of the naval service of the United States.

Upon the part of the defendants it is insisted that the claimant was lawfully dismissed, and therefore he has no right to recover, and that he was fully paid before dismissal.

On the 5th of September, 1867, it is shown by the findings that the claimant was placed under arrest to await trial by court-martial and served with a copy of charges by order of the rear-
33 admiral made on September 4 preceding. A court-martial was ordered by the admiral, consisting of seven officers and a judge-advocate, as shown in finding III. On the 5th day of September, 1867, charges and specifications were preferred against the claimant as shown in finding IV, consisting of two charges, first, drunkenness, and second, neglect of duty, with specifications, stating in detail the facts and circumstances of each charge, and on said charges and specifications the court found claimant guilty.

Upon the finding of the court is indorsed, by the rear-admiral commanding, the following in substance, that the proceedings are respectfully forwarded and submitted to the Secretary of the Navy for the action of the President under the act for the better government of the navy of July 7, 1862. The judgment and sentence of the court is that the claimant be dismissed from the naval service of the United States.

In the findings are shown the action of the Navy Department and the President, and it is insisted by counsel in that connection that the court-martial proceedings in question should have been fully reviewed by the President, and that before the proceedings reached him they should have been approved or disproved by the officer who ordered the court.

The findings as to the action of the President embrace a brief statement of the case embodying the substance and charges of the proceedings before the court-martial, with a comment upon the sufficiency of the evidence and the justice of the sentence. At the foot of what is called a brief in the case in the record of the executive department is the following:

"Respectfully submitted to His Excellency the President, for his action in accordance with article 19 of 'An act for the better government of the navy, approved July 17, 1862,' signed by the Secretary of the Navy."

Then follows on the same paper the word "approved" and the signature of the President.

It was most earnestly argued that the record of the action of the navy and executive departments is not sufficient to show that the President approved the findings of the court-martial upon his own personal investigation. The record came to the President through and by the Secretary of the Navy, in whose department the matter was properly pending, and it may be fairly presumed from the finding that the President had personal knowledge of the leading and

important features of the case, on which he based his judgment that the result reached by the court-martial was according to the truth and law of the case.

As a result of that finding and approval of the President, the Secretary of the Navy, on February 8, 1868, notified the claimant that the sentence of the court-martial dismissing him from the service had been approved by the President, and that because of such approval he was dismissed from the naval service from the date of the communication, and that thereafter he would not be regarded as an officer of the United States.

In the case of Wilcox *v.* Jackson (13 Pet., 498) the question was made as to whether the act of the Secretary of War was the act of the President, on which question the Supreme Court said:

"Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in pre-
34 suming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence, we consider the act of the War Department in requiring this reservation to be made as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was in legal effect a reservation made by order of the President, within the terms of the act of Congress."

In the case of Williams *v.* The United States (1 How., 290–297) the Supreme Court, upon the question of the acts of the President to personally perform all the executive duties of his office, said:

"Such an interpretation of the law this court can by no means admit. * * * The President's duty in general requires his superintendence of the administration; yet this duty can not require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incidental to services, which, nevertheless, he is, in a correct sense, by the Constitution and laws, required and expected to perform. This can not be * * * because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the Government in the personal action of the one chief executive officer. It can not be, for the stronger reason that it is impracticable, nay, impossible."

That principle of law was announced by the Supreme Court at a period in our history when the duties of the President were not a tithe of what they are at the present time. If the President were required to inspect and investigate personally every matter that falls within the purview of his official duty, the performance of the task would be impossible and the public business in one of the most important departments of the Government would be stagnated to an intolerable degree. The law presumes that the President has wise, faithful, and honest counselors to assist him in the discharge of his

duties, and he has a right to rely upon them to a certain extent even in the performance of his most delicate and important trust.

While the judicial power of the President, such as is exercised in passing upon the findings and sentence of a court-martial, can not be delegated, the President may avail himself of the services of a subordinate officer in all ministerial and clerical services which may aid him in the consideration of the finding and sentence of the court-martial; but the approval or disapproval of the finding and sentence must be the individual act of the President. He is the tribunal of final jurisdiction, which must pass upon the record and judgment of the court-martial. Therefore, for a court to sustain the sentence of a court-martial it must appear that the President approved the sentence. His personal knowledge of the facts disclosed by the record of the proceedings of the court-martial will be inferred from the terms of his approval.

In the case of Runkle *v.* The United States (122 U. S. R., 543) it is said, after referring to the case of Wilcox *v.* Jackson (*supra*) and other cases:

"Here, however, the action required by the President is judicial in its character, not administrative. As commander-in-chief of the army he has been made by law the person whose duty it is to
35 review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he can not delegate. His personal judgment is required, as much so as it would have been in passing on the case if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment, and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining, upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the Army of the United States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried."

In the case of Page *v.* The United States (137 U. S. Reports, 673) it is in substance held that the decision of the President confirming or disapproving the sentence of a court-martial in time of peace extending to the loss of life or dismissal of a commissioned officer is a judicial act to be done by him personally, and is not an official act presumptively his, but it need not be attested by his signature in order to be effectual.

In the case of Fletcher *v.* The United States (148 U. S., 84) the Secretary of War indorsed upon the record in that case the following order, dating it from the War Department and signing it as Secretary of War:

"In conformity with the sixty-fifth of the Rules and Articles of

War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

"The proceedings, findings, and sentence are approved, and the sentence will be duly executed."

In relation to that record the court says:

"The presumption is that the Secretary and the President performed the duties devolved upon them, respectively, and it would be unreasonable to construe the Secretary's indorsement as meaning that he had received the proceedings for the action of the President in conformity with article 65, and had approved them himself and ordered execution of the sentence in convention of the article."

In reference to the proceedings of the court-martial it is said:

"As the court-martial had jurisdiction, errors in its exercise, if any, can not be reviewed in these proceedings." (Dynes *v.* Hoover, 20 Howard, 65; Keyes *v.* The United States, 109 U. S., 336; Smith *v.* Whitney, 116 U. S., 167.)

In this case the approval of the President is founded on a condition of facts which affirmatively shows that he was advised in the premises by a knowledge of the case. He may not have read the entire record, but he had such knowledge as would enable him to pass intelligently and knowingly upon the question of the regularity of the proceeding and the justness of the sentence.

It is not necessary to resort to elementary works upon the subject of the law in the discussion and decision of the legal qual-
36 ities and character of courts-martial; it is sufficient to rely upon what the Supreme Court has said on that subject. In the case of Carter *v.* McClaughrey (183 U. S., 365) it is said: "Courts-martial are lawful tribunals with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by civil tribunals except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced."

The court-martial had jurisdiction of the person of the claimant and the subject-matter of the proceeding, to wit, the conduct of the claimant with reference to the performance of his military duties. When he became a part of the naval service he thereby subjected himself to the lawfully constituted courts-martial of the service, clothing them with jurisdiction over his person and conduct.

It is insisted by counsel for claimant that the proceedings of the court-martial are void because Rear-Admiral H. H. Bell, who convened the court, did not approve or confirm the findings of the court. To sustain this theory of the law the attention of the court is called to article 20 of the act of July 17, 1862, entitled "An act for the better government of the Navy of the United States" (12 Stat. L., 605), which is as follows: "Article 20. Every officer who is by this

act authorized to convene courts-martial shall have the power on revisal of its proceedings to remit or mitigate but not to commute the sentence of any such court which by this act he is authorized to approve and confirm."

In further support of the contention that the sentence is void because it does not appear that the admiral approved or disapproved the sentence. The case of Runkle *v.* The United States (*supra*) is cited in which the Supreme Court quotes the opinion of the Attorney-General (11 Opinions, 21), in which it is said in speaking of a court-martial:

"It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law*. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence can not be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law."

The statute provides that an officer who convenes a court-martial shall have power "on revisal of its proceedings to remit or mitigate, but not to commute the sentence of the court, and the question is, Does that provision of the law make it the duty of the officer to indorse upon the proceedings his action remitting, mitigating, approving, or confirming the sentence.

In this case the commanding officer transmitted the proceedings of the court to the Secretary of the Navy for the consideration of the President, without any suggestions, under the nineteenth article of the act for the better government of the navy, approved July 17, 1862 (*supra*). The latter part of that article reads as follows:

37 "All other sentences may be determined by a majority of votes, and carried into execution on confirmation of the commander of the fleet or officer ordering the court, except such as go to the dismission of a commissioned or warrant officer, which are first to be approved by the President of the United States." The action of the commanding officer was founded upon the construction of the law, that because the sentence involved the dismission of the claimant, it did not require him to take any action in the matter, except to forward the papers to be submitted to the President, in which construction of the law, in the opinion of the court, the officer was correct, and his failure to take any further action did not have the effect to nullify the proceedings of the court-martial.

Upon the question of whether the court was properly constituted, it may be said that it was ordered by the proper officer, to wit, the rear-admiral of the squadron to which the claimant belonged, and was composed of the minimum of officers; but it is insisted by coun-

sel for the claimant that it does not affirmatively appear that a larger number could not be procured.

In reply to this contention it may be said that the Supreme Court has held in substance, that when the commander in chief of a squadron not in the waters of the United States convenes a court-martial to try an officer, the courts of the United States will assume when his action in this respect is attacked collaterally, and nothing contrary appears on the face of the order convening the court, that he properly exercised his discretion, and that the trial of the accused by such a court could not be avoided without inconvenience to the service. (Mullan *v.* The United States, 140 U. S., 240.) That decision was in affirmance of the decision of this court (23 C. Cls. R., 40), in which is quoted approvingly, "Wherever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

On the 30th of May, 1867, the claimant was suspended from duty from 4 to 8 o'clock a. m. by order of Lieut. Commander C. C. Carpenter, and on the same day from 6 to 8 o'clock p. m. was restored to duty by Rear-Admiral H. H. Bell. It is insisted that his suspension and subsequent restoration were in law a discharge from all liability for the same offense for which he was tried and sentenced in the September following. His suspension from duty and restoration to duty on the 30th of May did not have the effect to relieve him from arrest and conviction at a subsequent period. His suspension was not a punishment, but simply had the legal effect of an arrest, and his restoration to duty only discharged him from the consequences of arrest and did not have the effect to discharge him from responsibility of the offense for which he was suspended and for which he was subsequently tried.

The petition is also based on a claim for additional pay from September 13, 1867, to February 8, 1868, in the sum of $257.13, being the difference between sea and shore pay, sea pay and waiting orders, and shore pay and waiting orders.

Upon this branch of the case the findings show that the claimant was detached from the U. S. S. *Wyoming* on September 12, 1867, and directed to report to Lieut. Commander C. C. Carpenter for passage to the United States in the U. S. S. *Wyoming*, under his com-
38 mand, and that upon claimant's arrival he should report to the honorable Secretary of the Navy. This order was made by the rear-admiral commanding the Asiatic squadron. In obedience to that order the claimant sailed for and arrived in the United States and reported to the Secretary of the Navy on February 9, 1868, and then and there received his order of dismissal, as shown in the findings.

The tenth finding shows the amount claimed founded upon the claimant's contention and the amount which has been paid upon the contention of the defendants.

The court decides that the claimant is not entitled to recover for services during which time he was out of the navy by the sentence of the court-martial, and that he is not entitled to recover the difference between what was paid him and what he claims from September, 1867, to February, 1868, and therefore the petition is dismissed.

39 IV.—*Judgment of the Court.*

JOSHUA BISHOP
vs.
THE UNITED STATES. } No. 21914.

At a Court of Claims held in the city of Washington on the 23d day of March, 1903, judgment was ordered to be entered as follows:

The court on due consideration of the premises, finds for the defendants and do order, adjudge and decree, that the petition of the claimant, the said Joshua Bishop, be dismissed.

BY THE COURT.

40 V.—*Application for and Order Allowing Appeal.*

From the judgment rendered in the above-entitled cause in favor of the defendant, the claimant by his attorney on the second day of June, nineteen hundred and three makes application for and gives notice of, an appeal to the Supreme Court of the United States.

IRWIN W. SCHULTZ,
Attorney of Claimant.

Filed June 3, 1903.

Order.

An appeal to the Supreme Court of the United States in above entitled cause is allowed this fourth day of June A. D. nineteen hundred and three.

C. C. NOTT,
Chief Justice.

41 Court of Claims.

JOSHUA BISHOP
vs.
UNITED STATES. } No. 21914.

I, John Randolph, assistant clerk of Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, of the

opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 9th day of June A. D., 1903.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,021. Court of Claims. Term No. 92. Joshua Bishop, appellant, *vs.* The United States. Filed July 24th, 1903.

Supreme Court of the United States.

JOSHUA BISHOP,
APPELLANT,
vs.
THE UNITED STATES.

No. 92
On Appeal from the Court of CLAIMS.
Appellant's Brief.

The appellant, Joshua Bishop (a citizen of the United States, an officer on the retired list of the United States Navy—Finding of fact (1) P. 26 Transcript), on June fifteenth, A. D., Nineteen Hundred, filed his petition in the Court of Claims to recover from the United States the sum of Eight Thousand Twenty-four Dollars and Seventy-nine Cents.

The Petition was filed under and by virtue of a private act of Congress, Approved June 3, 1900 (31 Stat. 1612) entitled Private, No. 645—"An Act for the Relief of Joshua Bishop."

Copy of the Act will be found by reference to Page 5, of the Transcript of the Record.

The Court of Claims, by its order dated March 23, 1903, dismissed Appellant's Petition. On June 2nd, 1903, Appellant made application to the Court of Claims for an allowance of an appeal to this Court, which appeal was allowed June 4th, 1903. P. 42 Transcript of the Record.

Appellant's contention in extenso appears by his Petition P. 1–6 Transcript.

Appellant's contention in substance is, that he is entitled to his claim, because he never was legally out of the Naval Service of the United States; that he was illegally deprived of his rank and pay by virtue of an illegal sentence of an illegal court-martial, and illegal dismissal from the Naval Service.

POINT I.

Appellant insists, that the alleged court-martial had no jurisdiction over him because he had already been punished for the alleged offenses charged against him. The alleged offenses occurred on the 30th day of May, 1867, in the harbor of Nagasaki, Japan.

Proceedings of the court-martial P. 7–25 Transcript.

Appellant insists, that for said offenses he was punished by suspension from duty on May 31, 1867.

It appears by reference to said court-martial proceedings (P. 7 and 8 Transcript), that the Appellant, when called on to plead, answered—"I plead in bar of trial, that I was placed under arrest for the offense specified, and was fully released from said arrest by order of Rear Admiral Bell. I refer the Court to Paragraph 1205, Book of Regulations for the government of the U. S. Navy, and also to the log-book of the "Wyoming."

The log-book entries referred to; P. 31 Transcript, under finding of Fact VI.

Paragraph 1205 of the Regulations of the Navy of 1865, provided—"An offense, committed at any one time, for which a person in the Navy shall have been placed under arrest, suspension or confinement, and subsequently entirely discharged therefrom, by competent authority, or for which he shall have been otherwise fully punished, is to be regarded as expiated, *and no further court-martial proceedings against him for the offense itself are ever afterwards to take place, etc.*"

Paragraph 455 of the Regulations of the Navy, of 1865, provides among other things—"That there shall be entered on the log-slate and log-book, *with minute exactness*, the following par-

ticulars: . . . . The names of all persons . . . . absent without leave; . . . . the nature and extent of all public punishment inflicted, with the name and crime of the offenders."

The log-book record shows, as appears by the same, P. 31 Transcript, that the appellant was suspended from duty by order of his commanding officer, and afterwards restored to duty by the Admiral of the fleet.

It must be presumed, that the navigator of the "Wyoming" complied with Paragraph 454 of the Regulations of the Navy of 1865, in keeping the ship's log-book, and seeing that all the particulars were duly entered; that after making the entry he sent it to the watch officer for signature, *while these circumstances were fresh in their memories*; and that he took the log-book to the commanding officer for inspection, immediately after noon of June 1st, 1867.

The Appellant was not furnished by his Commander, or any other officer, at the time of his suspension, May 31st, 1867, or on September 5th, 1867, when he was arrested for trial, with a copy of the communication and the order marked Exhibit "E," (P. 23 Transcript), as appears by finding of Fact VI, P. 30 Transcript.

The fact is, that the Appellant had no knowledge of Exhibit "E" until the hearing at the court-martial proceedings. Finding of Fact VI, P. 30 Transcript.

The log-book is an official register; it is provided for by statute, and the Book of Regulations for the government of the United States navy, and Appellant insists that the entry on the log-book of the "Wyoming" supra, relating to him, is conclusive; that the log-book shows that he was punished, and was restored to duty, by order, without qualification; that by Paragraph 1205 of the Naval Regulations of 1865 (supra.) the alleged offenses were to be regarded as expiated, and therefore the Appellant was not amenable to further court-martial proceedings for the same alleged offenses.

The Court of Claims in this case (P. 41 of Transcript), Held: "His suspension from duty and restoration to duty, on May 30,

"did not have the effect to relieve him from arrest and conviction "at a subsequent period. His suspension was not a punishment, "but simply had the legal effect of an arrest, and his restoration to "duty only discharged him from the consequences of arrest and "did not have the effect to discharge him from responsibility of "the offense for which he was suspended and for which he was "subsequently tried."

The Appellant respectfully submits, that the conclusion above stated is erroneous.

The facts are as follows:

The Appellant was a commissioned officer; on the 30th day of May, 1867, was punished by suspension for offenses and restored to duty; on September 5, 1867, more than three months after the suspension and restoration, he was served with a copy of charges (Findings of Fact II, P. 26 Transcript), which related to the same subject matter; on September 6, 1867, was tried by court-martial for the same alleged offenses.

Under finding of Fact VI, P. 30, it appears that Appellant had no knowledge or information of Exhibit "E" (P. 23 Transcript) until during the court-martial trial; was not furnished with charges upon which his suspension from duty was predicated, nor was Appellant called upon at any time, for a statement or list of persons, whom he might wish to have relative to them. The charges and specifications were preferred by Rear Admiral Bell at Shanghai, China, and dated June 21, 1867 (P. 21–22 Transcript). The first knowledge that the defendant had that he was to be court-martialed for the alleged offenses of May 30, was that of his arrest and the service upon him of the charges on September 5, 1867.

Was that notice in accordance with the law?

It is provided by Article 10 of the laws relating to the Navy, etc., Approved July 17th, 1862 (12 Stat., P. 63), "That no Commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest or confinement, and such suspension, arrest or

confinement, shall not continue longer than ten days, unless a further period is necessary to bring an offender to trial by court-martial . . . . All punishment inflicted by the Commander, or by his order, except a reprimand, shall be fully entered on the ship's log."

The restoration to duty of Appellant on May 31, was not for the purpose of bringing him to trial by court-martial, but for an opportunity to investigate the case. Ex. "E" P. 23 Transcript.

The suspension from duty was a punishment; it was in legal effect an arrest. He was restored to duty, and so far as he knew, without limitation.

Paragraph 1210, "Regulations of the Navy," of 1865, provides, "When an officer is suspended from duty and reported to a superior, the latter will call upon him for such explanation as he may choose to afford, in relation to the affair, and for a list of persons whom he may wish to have questioned in support of them, and the superior may institute general inquiry into the facts and circumstances to regulate his further proceedings."

Paragraph 1212, same Regulations, it is provided, "that if a case is referred to the commanding officer of the squadron to decide whether or not the subject matter shall be scrutinized by court-martial, that in so referring a case for such decision *special care* is to be taken to transmit at the same time to the authority, to whom the appeal is made, a particular statement of the offenses charged, embracing dates, places, and all other facts necessary to a conclusion as to the propriety or expediency of ordering a court martial, *and to frame charges and specifications* in case one should be ordered."

"Explanations of the party accused, etc., should invariably accompany the statement."

Article 38 of Laws Relating to the Navy, etc., approved April 23rd, 1800 (22 Stat. L. P. 50, 51,) which was not repealed by the Act of July 17, 1862, provides, "All charges, on which an application for a general court-martial is founded, shall be exhibited

in writing to the proper officer, and the person demanding the court-martial, shall take care that the person accused be furnished with a true copy of the charges and specifications, at the time he is put under arrest.

(Also Paragraph 1122, Regulations, etc., of 1865.)

Paragraph 1202, "Regulations of the Navy" of 1865, provides: . . . . And if, after the case of an offender to be tried by court-martial has been brought to the notice of the proper authority, empowered to convene such Court, the offender, *owing to imperative reasons*, cannot be brought to trial *within thirty days after that time*, he shall, unless the Secretary of the Navy or the Commander-in-chief otherwise directs, be released from arrest and returned to duty by his commanding officer, and to remain, until a court-martial can convene to try him, when he shall be again arrested on the day before the Court is ordered to convene, so as to undergo his trial before it."

The appellant insists that under the Statutory and Naval Regulations quoted, the court-martial had no jurisdiction over him until it affirmatively appeared that the legal requirements had been complied with.

The Appellant should have been served with a copy of the charges and specifications, as provided by Article 38 of the Act of April 23rd, 1800, supra, on May 31, 1867, when suspended; he should have been called upon for a statement as provided in Articles 1210, 1212, Regulations, etc., supra.

He should have been served with the order of Admiral Bell. Exhibit "E" (P. 20 Transcript), and the order should have been entered on the log-book of the "Wyoming." The Appellant was not furnished with a copy of the charges against him, upon which his suspension from duty was predicated, nor was the Appellant called upon at any time for a statement or list of persons whom he might wish to have, relative to them.

The service of the charges on Appellant, on September 5, 1867, was not a compliance with Article 38 of the Act of April 23, 1800

(22 Stat. L. P. 50–51); that service was more than three months after the 30th of May, when the alleged offenses were committed; and nearly three months after June 21, 1867, when the charges and specifications were formulated.

Paragraph 1202, Naval Regulations 1865 (supra), contemplates the trial of the offender within thirty days after his case has been brought to the notice of the person empowered to convene a court-martial. If he can not be brought to trial within that time, he is discharged from arrest, restored to duty, remains so until a court can be convened to try him, *when he shall be again arrested* on the day before the Court is ordered to convene, so as to undergo his trial before it.

This Paragraph makes no reference to the serving of the charges and specifications on the offender on the day before his trial. It says that the offender *shall be again arrested.*

This Paragraph contemplates the previous arrest of the offender; that he has been previously served with the charges and specifications and that all the Statutory and Naval Regulations have been complied with.

It appears that Appellant's alleged offenses were brought to the notice of Rear Admiral Bell, who was under the law empowered to convene a court-martial, on May 31, 1867. (Ex. "E" P. 20 Transcript). Bell preferred charges on June 21, 1867 (Ex. C. P. 21, 22 Transcript). The Appellant was not amenable to trial by court-martial after July 21, 1867, except under conditions arising under Paragraph 1202, supra; Appellant insists however that, (assuming that because of imperative reasons he could not be brought to trial within thirty days after May 31 or June 21, 1867) the court-martial had no jurisdiction over him, because he had not been furnished with a true copy of the charges and specifications at the time of his suspension or arrest on May 31, nor at any other time previous to September 5, 1867; that Article 38 of Laws Relating to the Navy (supra) relates to the time of the first or previous arrest, and not to the time of rearrest; and because

of the failures or omissions by his superior officers in complying with the law, in giving him notice, as herein above stated. The statutory regulations governing the proceedings of a court-martial must be complied with. In the case of *Brown* vs. *Keene* (8 Pet. 112) it was held :—" The trial, finding and sentence are the solemn acts of a Court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a Court of Justice; *rights which in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any one man, but which must be adjudged according to law.*

The judgment of a court-martial may be collaterally attached. (Ex. Parte Watkins, 3 Pet. P. 270.)

POINT II.

The Appellant insists, that the Court Martial that tried him was illegally constituted.

The Precept for the Court will be found by reference had to the bottom of Page 20 and top of Page 21 of Transcript.

Article Eleven of the Act of July 17th, 1862, 12 Stat., 603, provides—" A General Court Martial shall consist of not more than thirteen nor less than five commissioned officers as members; *and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned in every such Court*, but in no case where it can be avoided without injury to the service, shall more than half, exclusive of the President, be junior to the officers to be tried. The senior officer shall always preside and the others shall take place according to their rank."

Appellant's insistment is, that the court-martial that tried him, consisting of less than thirteen members, had no power or authority to try and sentence him without showing affirmatively, that as many officers, not exceeding thirteen, as could be convened without injury to the service, could have been summoned.

It is held in *Mills* vs. *Martin*, 19 Johns, (N. Y.) P. 29, that

the officer instituting the court-martial is *to judge and decide on the point of injury to the service*; that the officer is bound to adjudicate and to express his opinion to that effect, whenever he directs a general court-martial to consist of less than thirteen members, and the fact of injury to the service ought to have been averred, in order to show jurisdiction of a less number than thirteen.

In *Runkle* vs. *U. S.* 122 Sup. Ct., Rept. P. 543, C, it is held, that to give effect to sentences of court-martial it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentences were conformable to law. In the case of *Brown* vs. *Keene* 33, U. S. (8 Pet.) 115, etc., it is held that the authority of a court-martial is statutory; that the facts necessary to show their jurisdiction must be stated positively; that it is not enough that they may be inferred argumentatively. An inspection of the precept Ex. "A," P. 27, Transcript, will show, that there is no averment why more than the seven officers, as members, to the number of thirteen could not have been convened, without injury to the service.

We insist that the omission of such an averment or the omission of an averment to the effect that only the officers as members as were convened, were all that could be summoned without injury to the service; or the omission of an averment that no other officers than those named could be summoned without injury to the service, is jurisdictional and fatal to the jurisdiction of that Court.

Had the statutory provision (Article II, supra,) only recited that, "A court-martial shall not consist of more than thirteen, nor less than five commissioned officers as members, ... who shall be summoned on every such Court," it might be construed that the Act was merely directory; that the officer appointing the Court could exercise discretion in selecting not less than five or more than thirteen; that the number to be selected between five and thirteen was in a manner submitted to his sound discretion.

But Congress did not intend that the liberty and property

rights of its servants who support the honor and integrity of the United States under arms, should be hazarded by the *ipse dixit*, or whim of one man, superior in rank to the accused, and who may, or may not be prejudiced against the accused. Congress meant further: it directed that as many officers up to, but not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such Court. Does not that call upon the convening officer to state or aver, after he has made his appointment, that no more officers can be convened without injury to the service? The Act means that the summoning officer must convene a court of thirteen officers as members, and if the Court does not contain that number, he must aver in the precept that a greater number could not be summoned without injury to the service.

If the precept in question is good, then does the Article mean the same as if it read that the convening officer may, if deemed advisable, convene a court-martial composed of any number of officers between five and thirteen. But it is held in 4 Wallace (S. C.), P. 709, 446 that where power is given by permissive language to do certain things, the language used will be regarded as peremptory when the public interests or individual rights require that it should be done.

By the Regulations for the government of the Navy, 1900, Paragraph 1837, P. 457, it is now provided, "A statement that no other officers than those named can be summoned without injury to the service, shall be an essential part of the order convening the Court, etc." That provision is nothing new, because that always was the law.

When the statutory conditions as to the constitution of the jurisdiction of the Court are not observed, there is no tribunal authorized by law to render the judgment. *Keyes* vs. *U. S.*, 109 V. S., P. 136.

Wells on Jurisdiction of Courts, Ed. 1880, Sections 15-17, P. 11 and 12.

In regard to inferior Courts, their action must be confined

strictly within the prescribed limits, and must appear so on the face of the proceedings as also the facts and ground of jurisdiction. A general averment of jurisdiction amounts to nothing; the facts upon which it depends must specifically appear. Nor is it sufficient that jurisdiction may be inferred argumentatively from the averments, but the jurisdiction must be positively averred, and the fact upon which it depends expressly set forth; every fact essential to the jurisdiction should appear on the record.

Wells on Jurisdiction, supra., Sections 40, 41, 42; P. 19, 30.

Precept Ex. "A" as it is, or even if it recited as we insist it should have been recited, Appellant has the right to impeach by the record or dehors the record.

It is held in People Ex. Rel. *Fry* vs. *The Warden*, etc. 100 N. Y., P. 26, with reference to Courts of limited and inferior jurisdiction, "Whether the record recites the jurisdictional facts or not, it has uniformly been held that their judgments are open to impeachment by extrinsic evidence showing want of jurisdiction."

It may be advanced that, although the Precept Exhibit "A" is defective as pointed out, that the Court had no jurisdiction over the Appellant, yet Appellant did not challenge the Court because of that defect. The answer is, the omission in that respect did not operate as a waiver or an estoppel.

Whether it is competent to an accused to waive an objection to the jurisdiction of the Court is questionable.

Brook vs. *Davis*, 17 Pick. (Mass.) 148.

Brook vs. *Davis*, 22 Pick. (Mass.) 498.

Consent cannot give jurisdiction in a criminal case, where the indictment is for a subject matter out of the jurisdiction, not even if the prisoner enter of record a waiver of "all objections" to an irregularity in finding of indictment and to jurisdiction; or where the law imperatively requires twelve jurors, and by consent the case is tried by six only, etc.

Wells on Jurisdiction of Cts., Section 66, P. 47, 48.

POINT III.

Said court-martial proceedings are void, because Rear Admiral H. H. Bell, who convened said Court, did not approve or confirm the findings and sentence of said Court.

The Rear Admiral forwarded the proceedings, without record that he either reviewed, or approved, or confirmed or disapproved same. P. 29 Transcript.

It is provided in Article 20, of Act of July 17th, 1862, Chapt. 204, 12 Stat. 600, "Every officer who is authorized to convene a general court-martial shall have power on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such Court which he is authorized to approve and confirm."

That the language of Article 20, was construed by the Navy Department to be mandatory, and not permissive, is plain.

Paragraph 1239, Regulations 1865, provides, "The sentences of all courts-martial not which may be but which shall be approved on a foreign station, etc."

As early and before October 27th, 1824, it was a requirement and an essential one, in cases of general court martial, that the officer convening such a Court should not only approve or disapprove the proceeding, but whether approved or disapproved, reasons therefor should be stated.

In re Lieutenant Joshua R. Sands and in re Midshipman John M. Rinker, the American State Papers, Naval Affairs, Vol. 2, P. 539, 540.

In Vol. II, Opinion of Atty. Gen., P. 19, etc., it is stated, "I have quoted Art. 20 because it shows that Congress intended that the officer who is authorized to approve and confirm the sentence of a court-martial, uuder this Act, in reviewing its proceedings, should act *judicially*; that is that he should exercise the discretion confided to him within the limits of the law."

Also *Runkle* vs. *U. S.*, supra, P. 543, etc., in which the remarks of Attorney General Bates, in an opinion furnished to President Lin-

coln, under date of March 12th, 1864, (11 Attorney General, 19, 20, 21) concerning the review and approval of proceedings, are approved.

Our insistment is that the forwarding of the proceedings without reviewing or approving same, taken in connection with the fact that Appellant was ordered to perform a duty, operated as a disapproval and a discharge of the proceedings and sentence.

Such officer, whenever authorized to approve, may, instead, disapprove; disapproving being simply the absence or withholding, stated in terms, of the approval or confirmation which is necessary to the taking effect of the judgment of the Court." (I Withorp's Military Law, P. 689). 689

A disapproval of a sentence by the proper reviewing officer, release from confinement, and restoration to duty is tantamount to an acquittal by the Court. (Op. Atty. Gen'l. XIII, P. 459)

POINT IV.

We further insist that said proceedings and sentence, as well as the order of dismissal (P. 30 Transcript) are absolutely void, because the Appellant, a Lieutenant Commander and a commissioned officer of the Navy of the U. S., was dismissed from the naval service by the sentence of a court-martial without said sentence being confirmed by the President of the United States.

Art. 19 of the Act of July 17th, 1862 (12 St. L. P. 600) provides, that "No sentence of a court-martial, extending to the loss of life, or the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President." Evvery sentence of a court-martial is interlocutory and inchoate until *an order of confirmation* by the commanding officer.

The proceedings of the court-martial are not definite, but merely in the nature of an inquest, to inform the conscience of the commanding officer.

Mills vs. *Martin*, 19 Johns, Rep. P. 30.

That the President must confirm such sentence; that his ap-

proval must be authenticated in a way to show otherwise than argumentatively; that his approval is the result of his own judgment and not a mere departmental order, which may or may not have attracted his attention, and the fact that the order was his own and not left to inference only; that the action required of the President is judicial and not administrative, is clearly laid down in the case of *Runkle* vs. *U. S.*, 122 U. S. P. 543.

In Appellant's case, a Clerk—not the Secretary of the Navy or the President of the United States, reviewed the court-martial proceedings; the Clerk prepared the Brief (Finding of Fact V, P. 29, Transcript.)

The President *did not have before him the court-martial proceedings at any time; the only paper the President saw and signed* was that Brief.

Admiral Bell having disapproved the proceedings and sentence of the court-martial, the approval of the President (if the action of the President in signing Ex. C, P. 29, Transcript, was an approval according to law) was a nulity. (I Winthrop's Military Law, P. 689.

POINT V.

Appellant respectfully submits, that he was not lawfully out of the naval service, and is therefore entitled to pay in amount as found by the Court of Claims. (Finding of Fact, P. 32-3-4 Transcript.)

The U. S. S. "Wyoming" was a war-ship. (Paragraph IX, Naval Regulations 1865.)

Appellant on September 12, 1867, received from Admiral Bell the order of detachment (P. 2 Transcript). Afterwards reported to Navy Department in obedience to said order and by virtue of Paragraph LXXXIX Naval Regulations 1865.

Appellant's pay was changed from sea to shore pay, under provisions of Paragraph 1164, Naval Regulations 1865; which

Regulation was overruled by Symond's Case (120 U. S. Rept. P. 46.)

Defendant is entitled to sea instead of shore pay from September 13, 1867, to February 9, 1868.

IRVIN W. SCHULTZ,
Appellant's Counsel.

In the Supreme Court of the United States.

JOSHUA BISHOP, APPELLANT,
v.
THE UNITED STATES.
No. 92.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Appellant was dismissed from the United States Navy, as a lieutenant-commander in that service, on February 8, 1868, by the President of the United States, pursuant to the sentence of a general court-martial. On March 8, 1871, pursuant to a special act of Congress, he was again appointed by the President and commissioned as a lieutenant-commander in the Navy, to date from March 1, 1871. On December 31, 1896, he was transferred to the retired list of the Navy, pursuant to section 1453 of the Revised Statutes. He brought this suit in the Court of Claims to recover the pay of his grade as lieutenant-commander for the time he was so out of the service, on the grounds that he was illegally dismissed by the President on ~~December~~ February 8, 1868, because, as he alleges, the said dismissal was illegal and void. The Court of Claims rendered a judgment against him in the suit and dismissed his petition, and he has appealed from that judgment.

Appellant makes no formal assignment of errors. His brief states (pp. 1, 2) that: "Appellant's contention in extenso appears by his Petition (P. 1–6, Transcript)," and that his "contention, in substance, is that he is entitled to his claim, because he never was legally out of the Naval Service of the United States; that he was illegally deprived of his rank and pay by virtue of an illegal sentence of an illegal court-martial and illegal dismissal from the Naval Service." Then he goes on to state in his brief a number of "POINTS," in which he cites the proceedings of the court-martial, a transcript of which is attached to said petition. The proceedings of the general court-martial referred to are not set forth in the findings of fact made by the court below. Probably they are substantially set forth in the transcript attached to the petition, and we have no objection to appellant referring to the court-martial *proceedings* if this court will permit him to do so, because it is not our desire to defeat this appeal by any legal technicalities.

So far as we can ascertain from appellant's brief what the errors of the court below complained of are, they are stated under five points, as follows:

POINT I.

"That the alleged court-martial had no jurisdiction over him, because he had already been punished for the alleged offenses charged against him. The alleged offenses occurred on the 30th day of May, 1867, in the harbor of Nagasaki, Japan."

POINT II.

"That the court-martial that tried him was illegally constituted."

POINT III.

"Said court-martial proceedings are void, because Rear-Admiral H. H. Bell, who convened said court, did not approve or confirm the findings and sentence of said court."

POINT IV.

"That said proceedings and sentence, as well as the order of dismissal (p. 30, transcript), are absolutely void, because the appellant, a lieutenant-commander and a commissioned officer of the Navy of the United States, was dismissed from the naval service by the sentence of a court-martial without said sentence being confirmed by the President of the United States."

POINT V.

"That he was not lawfully out of the naval service, and is therefore entitled to pay in amount as found by the Court of Claims."

These alleged errors are all founded upon the *proceedings* of the said general court-martial attached to the petition, and the action of the Secretary of the Navy and of the President of the United States upon the court-martial record and said sentence of dismissal. That action is set forth in Finding V of the Court of Claims. (Rec., pp. 29, 30.)

ARGUMENT FOR APPELLEE.

Our contention is that the general court-martial referred to was legally appointed and constituted as set forth in Finding III of the court below (R., 27); and

that the said court-martial had full jurisdiction over the person of and the offense charged against Lieutenant-Commander Bishop, and lawfully sentenced him "to be dismissed from the naval service of the United States," as set forth in Finding IV (R., 27, 28); and, furthermore, that no law of Congress required the rear-admiral commanding the United States Asiatic Squadron to act upon the said proceedings of the general naval court-martial referred to, other than to forward them to the honorable Secretary of the Navy for the action of the President of the United States, which was duly done. (Ib., R., 29.)

In making the above-mentioned "*points*" appellant states a number of minor points and argues them. They were all argued in our brief for the United States filed in the court below, and, as we do not desire to say anything in response to this appeal which was not plainly and clearly stated in that brief, we shall now content ourselves with relying upon the argument made to the court below in that brief, which was as follows:

The petition in this case sets forth a claim for the pay of a lieutenant-commander in the Navy of the United States from February 9, 1868, to March 9, 1871, in the sum of $8,067.99, and the claim is made under the provisions of a private act of Congress, approved June 6, 1900 (31 Stat., 1612), entitled:

AN ACT for the relief of Joshua Bishop.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of Joshua Bishop for alleged items of pay due and unpaid

> to him for services as a lieutenant-commander, United States Navy, between the dates of September thirteenth, eighteen hundred and sixty-seven, and March ninth, eighteen hundred and seventy-one, be, and the same is hereby, referred to the Court of Claims. Jurisdiction is hereby conferred on said court to try said cause—the statute of limitation shall not apply thereto—and to render final judgment therein, subject to the right of appeal by either party.

During most of the time mentioned in this act the claimant was not in the service of the United States as an officer of the Navy or in any other position or capacity. He held the office of lieutenant-commander in the Navy until February 8, 1868, and was paid as such up to that time. On that date he was dismissed from that service in pursuance of a sentence of court-martial, which was approved by the President, as set forth in a letter addressed to him by the Secretary of the Navy, which is printed [in Finding V R., 30] on page 2 of the petition.

I.

THE FIRST QUESTION WHICH THE CASE PRESENTS IS AS TO THE JURISDICTION OF THIS COURT.

The legal effect of the above-quoted private act is to confer jurisdiction upon the Court of Claims "to try said cause, * * * and to render final judgment therein, subject to the right of appeal by either party."

In other words, Congress has enabled the Court of Claims to take jurisdiction of the claim, notwithstanding the bar of the statute of limitations (section 1069,

R. S.), but only in so far as the court could have taken jurisdiction of it if a petition setting forth the claim had been filed within six years after February 8, 1868.

The claimant [appellant] appears to have construed this private act, as far as may be inferred from his requests for findings of fact, as authorizing the court to *review the proceedings and sentence* of the general court-martial which tried and convicted him and sentenced him to be dismissed from the service in September, 1867. The obvious and unanswerable reply to this contention is that to give such unprecedented jurisdiction it must be granted in plain and most unmistakable words. But the act admits of no construction; properly interpreted it merely removes the bar of the statute of limitations and leaves the claim to be determined according to the ordinary jurisdiction of the court in like court-martial cases.

In regard to *the question of jurisdiction* this private act is similar to the private act which conferred jurisdiction of the claim of Joseph M. Cumming *et al.* upon this court in 1885. That claim was for damages for the tortious seizure of the claimants' commission houses and bonded warehouses and the breaking up and interrupting of their business by a collector of internal revenue. The act read that claimants "* * * be permitted to sue in the Court of Claims; which court shall pass upon the law and facts as to the liability of the United States for the acts of its officer" * * *; and that "the United States shall appear to defend against said suit, and either party may appeal

to the Supreme Court as in ordinary cases against the United States in said court; and said suit may be maintained, any statute of limitation to the contrary notwithstanding." (22 C. Cls. R., 345.)

The claimants in that case recovered a judgment in this court for the damages alleged; but on appeal to the Supreme Court the judgment was reversed on the grounds that the act merely waived a defense based upon the statute of limitations, and did not waive any defense based upon the non liability of the United States for the damages complained of. (*United States* v. *Cummings*, 130 U. S., 452.) Speaking of the private act in that case, Mr. Justice Harlan, when delivering the opinion of the Supreme Court, said: "The only right waived by the Government was a defense based upon the statute of limitations. (*Erwin* v. *United States*, 97 U. S., 392; *Tilson* v *United States*, 100 U. S., 43; *McClure* v. *United States*, 116 U. S., 145.)" And he laid it down as a principle of jurisdiction under such private acts "that the liability of the Government should be determined by the settled principles of law," unless an intention to the contrary be "expressed in language not to be misunderstood."

In *Erwin's case* "jurisdiction of the claims of Robert Erwin" was given to the Court of Claims under the provisions of the act of March 12, 1863 (the abandoned and captured property act), by a private act which was passed for his relief on February 5, 1877 (19 Stat., 509), because the "claims were, by accident or mistake of his agent or attorney, and without fault

or neglect on his part, as was claimed, not filed within the time limited by said act." The Supreme Court, affirming the judgment of this court in that case, held that the private act did not waive any defense under the bankrupt act.

In *Tillson's case* the claim was for damages for breach of contract by the United States in respect to the time and manner of payment. It was referred to the Court of Claims by a private act which "authorized and directed" the court "to investigate the same, and to ascertain, determine, and adjudge the amount equitably due, * * * if any, for such loss and damage;" and it was held that the general provision of law against the payment of interest in such cases was not waived by the private act. Speaking of its language, Mr. Chief Justice Waite, delivering the opinion of the Supreme Court affirming the judgment of this court, said:

> We have no doubt it was the wish of those who procured the passage of the special act, under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for the court to give a judgment against the United States at least for interest, in case it should be found that payments on the contract held by the claimants had been unreasonably delayed. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power. * * * The same principles of jurisprudence

and the same statutory regulations as to practice are to be applied here that would be if the case had come into the court under its general jurisdiction.

In *McClure's case* a private act referred his claims to the Court of Claims "with jurisdiction to hear and determine said claims." The act said that if the court should be satisfied from the evidence that any of the moneys charged to him "were not in fact received by him, or that other just and equitable grounds exist for credits claimed by him," it should "make a decree," etc., in his favor. It was contended in that case that the private act conferred equity jurisdiction upon the court; but the Supreme Court, *held*, that it conferred only the ordinary jurisdiction of the Court of Claims of the subject as a court of law, and said that the suit "clearly comes within the principle of *Tillson's case*" (*supra*).

The principle established by these cases is this:

> *When claims are referred to the Court of Claims by private acts of Congress, with jurisdiction to hear and determine the same, or to "try the cause" (as in the case at bar), only the ordinary jurisdiction of the court is invoked, and no legal or equitable defense is waived unless the act expressly, or by necessary construction, so provides.*

It is no answer to this rule of jurisdiction to say that the act was passed expressly "for the relief" of the plaintiff. Replying to that suggestion in *Cummings' case*, Mr. Justice Harlan said:

"A satisfactory answer to this suggestion is

> that if Congress intended to do more than give the plaintiffs an opportunity, in an action for damages brought in the Court of Claims, to test the question as to the liability of the United States, upon the law and facts, for the alleged wrongs of their officers, that intention would be expressed in language not to be misunderstood. It is as if the plaintiffs asserted before Congress the liability, in law, of the Government for the damages they sustained, and Congress permitted them to invoke the jurisdiction of the Court of Claims in order that there might be a judicial determination of the question by that tribunal, with the right of appeal "as in ordinary cases against the United States in said court."

This is exactly what the private act for the relief of the present claimant has done. For years he had been appealing to Congress by petitions alleging that he was the victim of a sentence of an illegal naval general court-martial, and was illegally deprived of his commission and pay; and at last Congress "referred" *not these complaints* to the Court of Claims, but only, as the private act says:

> The claim of Joshua Bishop for alleged items of pay due and unpaid to him for services as a lieutenant-commander, United States Navy, between the dates of September 13, 1867, and March 9, 1871.

This act confers no other jurisdiction upon the Court of Claims than "to try said cause." What cause? Certainly the only answer is the cause so referred—the

claim "for alleged items of pay * * * for services as a lieutenant-commander, United States Navy." Suppose the claimant had already been fully paid that pay, would the private act estop the Government from that defense? Suppose he had been promoted to the rank of commander and was so serving and paid for that time, would the Government be estopped from that defense? If not, is there any reason or rule of construction or interpretation that would estop the defendants from showing that claimant—

1. Was not in fact or in law, during the time mentioned, in the service of the United States as a lieutenant-commander; or

2. That the "alleged items of pay" were not due him, because on February 8, 1868, he was dismissed from the naval service of the United States pursuant to the sentence of a naval general court-martial, which was approved by the President; or

3. That he was dismissed from his office by the President without trial by a court-martial; or

4. That the vacancy caused by his dismissal from office was filled by the President, by and with the advice and consent of the Senate?

These are all valid legal defenses to the kind of claim set forth in the petition.

II.

The facts that the claimant was dismissed from the Navy pursuant to the sentence of a naval general court-martial which had jurisdiction of his person and of the offenses of which he was convicted, and that the

vacancy in office created by his dismissal was no doubt filled by the President by the appointment of a successor, by and with the advice and consent of the Senate, would seem to leave nothing for the court to do but to find these facts and to dismiss the petition. But as a number of suits involving the validity of the sentences of naval general courts-martial are now pending here, and as many seamen in the naval service have been falsely or mistakenly advised that they can obtain relief in this court from such sentences on various technical grounds based upon alleged errors of procedure which are wholly untenable, it will not, perhaps, be out of place to give a little consideration to some of the alleged errors of the court-martial in the present case, as presented in this petition.

The claimant does not allege directly in his petition that he was dismissed from the naval service pursuant to the sentence of a court-martial. The fact is, however, stated inferentially, by setting forth, in paragraph II, a letter of dismissal addressed to him by the Secretary of the Navy on February 8, 1868. It should have been stated positively; but all the petition is likewise defective.

The petitioner avers in paragraph III, citing the articles for the government of the Navy in the act of July 17, 1862 (12 Stat., p. 600), that his "alleged dismissal" mentioned in that letter was "illegal and utterly void," meaning that "the alleged court-martial proceedings * * * were from the beginning utterly illegal and void," on the following grounds:

1. That the court-martial "was not legally constituted," as required by Article 2, in that "it does not appear on the face of the said alleged court-martial proceedings that no more officers other than those named, who composed said alleged court, could be summoned to compose a court of thirteen members without injury to the service."

2. That H. H. Bell, rear-admiral commanding Asiatic Squadron, who convened said alleged court-martial, did not review the proceedings of said alleged court, and did not approve or confirm the findings and sentence of said alleged court, as directed and required by article 20.

3. That "said alleged sentence" of dismissal * * * was not confirmed by the President, "as required by article 19."

If this court had jurisdiction to review these "alleged" errors, our answer to the first alleged error would be that the officer who convened the court-martial was the sole and exclusive judge of the question as to whether the court could be composed of a lesser number of officers than thirteen "without injury to the service." Nothing in the act of Congress requires the appointing officer to state that conclusion in his prescript or elsewhere. (*Martin* v. *Mott*, 12 Wheat., 19, 31; *Mullan* v. *United States*, 140 U. S., 240, 245.)

As to the second alleged error, nothing in Article 20 or any other act of Congress required the convening officer to review the proceedings of the said court-martial or to approve or confirm its sentence.

As to the third alleged error, Article 19 was strictly complied with. The sentence of dismissal was approved by the President of the United States. As to the *manner* of the approval, the statute gives no directions. The approval may be oral or in writing, or in any other manner that the President in his discretion pleases. (*United States* v. *Page*, 137 U. S., 673, 679; *United States* v. *Fletcher*, 148 U. S., 84.) It does not require the President to personally review the proceedings of a court-martial, or even to see them. Those matters are usually attended to for the President by the proper officers of the Navy Department.

The other averments in this paragraph of the petition are what may be called conclusions of law, *e. g.:*

4. That "the findings and sentence of the court" were unjust.

5. That the record of the proceedings "are not in form or substance sufficient in law" to warrant claimant's dismissal set forth in Paragraph II.

6. That the "findings" of the court-martial "were contrary to the evidence and weight of evidence."

The last averment of this paragraph is to the effect that claimant "used every due diligence and effort to have said and every of said orders and proceedings set aside, for nothing holden, and to be restored to his place and rights in grade and pay." This averment, which is wholly immaterial, we are willing to admit, although it does not appear that claimant ever applied to the President or to any court of competent jurisdiction for such relief, or even tried to obtain a judgment

in this court for his pay upon the grounds that the court-martial sentence was null, or void, or for any other reason. He now comes here for the first time, under the above-mentioned private act, which merely waives the statute of limitations in his behalf, and leaves the cause to be determined under the general rules of law applicable to such claims as if they were presented to the court within six years after they first accrued. He asks the court to include these and other irrelevant allegations in the findings of fact. To all such requests we object, on the ground that to allow them would be as erroneous as to grant prayers of instruction to a jury submitting matters of conjecture as evidence on which they might base a verdict. (*Northern Pacific R. R.* v. *Perrien*, 167 U. S., 48–56.) This is not an appellate court for court-martial cases.

In this view of the case the main and only question of law before the court is as to the jurisdiction of the court-martial which sentenced Lieutenant-Commander Bishop to be dismissed from the naval service.

In such cases, said Chief Justice Drake, delivering the opinion of the court in *Keyes* v. *United States*—a court-martial case—(15 C. Cls. R., 532–541):

> No doctrine is better settled than that judicial proceedings can be assailed or questioned collaterally only when the court in which they occurred was without jurisdiction to take them.

And his honor, the present Chief Justice of the Court of Claims, concurring, said: "I am of the opinion that when an officer has been removed and his

successor appointed and confirmed, this court can not inquire into the legality or regularity of his removal."

In that case the court-martial was appointed on February 1, 1877, and its sentence of dismissal was approved by the President, to take effect on April 20, 1877. Affirming the judgment of this court in that case (109 U. S., 336, 339), Mr. Justice Blatchford, delivering the opinion of the Supreme Court, said:

> It was held by this court in *Blake* v. *United States* (103 U. S., 227), that the President has the power to supersede or remove an officer of the Army by the appointment of another in his place, by and with the advice and consent of the Senate, and that such power was not withdrawn by the provision of § 5 of the act of July 13th, 1866, c. 176, 14 Stat., 92, now embodied in § 1229 of the Revised Statutes, that "no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." It was held that this provision did not restrict the power of the President, by and with the advise and consent of the Senate, to displace officers of the Army or Navy by the appointment of others in their places.

(Affirmed again in *Chrenshaw* v. *United States*, 134 U. S., 99, 107; *Mullan* v. *United States*, 140 U. S., 240, 245; and *Parsons* v. *United States*, 167 U. S., 343.)

The doctrine so stated was held sufficient for the affirmance of the judgment of this court which dis-

missed the petition in that case. Nevertheless, Mr. Justice Blatchford, answering the contention of counsel that the record of the court-martial must affirmatively show not only jurisdiction, but regularity of proceedings, said:

> That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid, when it is questioned in this collateral way. (*Thompson* v. *Tolmie*, 2 Peters, 157; *Voorhees* v. *Bank of United States*, 10 id., 449; *Cornett* v. *Williams*, 20 Wallace, 226, 249.) This doctrine has been applied by this court to the judgment and sentence of a naval general court-martial which was sought to be reviewed on a writ of *habeas corpus*. (*Ex parte Reed*, 100 U. S., 13.)
>
> Where there is no law authorizing the court-martial, or when the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment. Of that character are the authorities cited and relied on by the appellants; but they do not apply to the present case.

The doctrine here stated is that whatever irregularities or errors are alleged to have occurred *in the proceedings*, "the sentence of a court-martial must be held valid when it is questioned in a collateral way, if the

court-martial had jurisdiction of the accused and of the offense charged against him." And this is again affirmed and reaffirmed in *Johnson* v. *Sayre*, 158 U. S., 109, and *Carter* v. *McClaughry*, 183 U. S., 365.

Now, it may be asked, What irregularities or errors does the word "proceedings" include? It is evidently used as a law term, and the Supreme Court at the preceding term of 1882 furnished a very comprehensive definition. Mr. Justice Miller, delivering the opinion of the court in *Kring* v. *Missouri* (107 U. S., 221, 231), said: "The word 'procedure' as a law term is not well understood;" and adopting its definition by Bishop, "the distinguished writer on criminal law in America," he defined its meaning as follows:

> The term "procedure" is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms—pleading, evidence, and practice. * * * The word [practice] means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in; and evidence, he says, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.

In *Swain* v. *United States* (165 U. S., 553, 565) the doctrine is well reaffirmed that—*Where a court-martial had jurisdiction over the person and the case, its proceedings can not be collaterally impeached for any mere error*

or irregularity committed within the sphere of its authority. All of the many errors alleged in that case were alleged errors of procedure (28 C. Cls. R., 216). "These," said our now Chief Justice, "can not be reviewed collaterally;" and in affirming the judgment of the Court of Claims in that case the Supreme Court said that instead of considering the several propositions urged by counsel, "we might well content ourselves with a reference to the able and elaborate opinion of the Court of Claims delivered by Justice Nott." See *Johnson* v. *Sayre*, 158 U. S., 109, and also *Carter* v. *McClaughry*, 183 U. S., 365, where the rule is "*reiterated*" *that civil tribunals will not revise the proceedings of courts-martial, except for the purpose of ascertaining whether they have jurisdiction of the person and of the subject-matter, and whether, though having such jurisdiction, they have exceeded their powers in the sentence pronounced.*

ALL THAT ANY CIVIL OR CRIMINAL JUDICIAL COURT CAN DO IN A COURT-MARTIAL CASE IS LIMITED TO QUESTIONS RESPECTING THE JURISDICTION OF THE COURT-MARTIAL.

It is well settled that if the court-martial have jurisdiction of the person to be tried and of the offense charged against him, the President of the United States alone has the power to review its proceedings when a commissioned officer is sentenced to be dismissed. He is "the court of last resort" (*Carter's case*, *supra*, 385), but the "review" may be by the Secretary of the Navy or the Attorney-General (*ib.*, 373, 386), and on that review the President may "approve" the sen

tence. Speaking for the Supreme Court in *Elliott* v. *Piersol* (1 Pet., 328), Mr. Justice Trumble said:

> When a court has jurisdiction, it has the right to decide every question which occurs in the cause. And whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. * * * They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

As the Secretary of the Navy and the President of the United States were the persons concerned in the execution of the sentence of dismissal in Lieutenant-Commander Bishop's case, we might be allowed to question the liability of these officials, on the facts of this case, if claimant had sued them in an action of trespass. He wisely did not attempt to sue. But at this late date—more than thirty years after his dismissal from the Navy, when everybody concerned in his dismissal has long since died, and long after the responsible officers of the court could have been sued for trespass[a]—claimant now alleges that the whole proceedings of the court-martial were void and his dismissal therefore utterly void.

When Congress generously authorized the President to reappoint him as lieutenant-commander in the Navy, and his new commission in that grade was sent to him,

[a] According to this view, claimant's case would be one "sounding in tort," and hence the private act would not give this court jurisdiction of it. (Cummings' case, *ante.*)

he wrote on March 9, 1871, a letter of acceptance to the Secretary of the Navy, in which he stated that he did not voluntarily surrender his claim to the effect that up to that time he had been a lieutenant-commander in the Navy by virtue of a commission dated March 3, 1865, and was never legally deprived of that commission. Answering that communication the Secretary of the Navy, on March 18, 1871, peremptorily informed him that the Department declined to receive such an acceptance, and that the acceptance must be unconditional and disconnected with any other matter. The claimant, recognizing the mistake he had made, most respectfully complied with the Secretary's requirement, and forwarded, on March 27, 1871, a proper letter of acceptance. (Finding VII, R., 31.)

It might here be said that claimant at that time waived all consideration of any claim he might have had growing out of his court-martial and dismissal from the Navy.

Another estoppel might be raised in this case, founded on Article 37, section 1624, of the Revised Statutes, if claimant's contentions could be sustained. That article—if it could be regarded as binding upon the President—provides that—

> *When any officer who is dismissed by order of the President makes, in writing, an application for trial [by court-martial], setting forth under oath that he had been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such*

officer on the charges on which he shall have been dismissed. And if such a court-martial shall not have been convened within six months of the presentation of such application for trial, or if such court, being convened, shall not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

The claimant now contends that he was never tried by court-martial, on the grounds that the court which tried him was an illegal court; but, in that view of the case, he might have availed himself of the provisions of this article. There was nothing to prevent his making an application to the President under it within a reasonable time, or at least before all the important witnesses were dead. For this reason alone he should not be allowed in any civil court to question the legality of his trial and dismissal from the service. But it is altogether unnecessary to resort to the doctrine of estoppel; he *was* legally tried and dismissed.

III.

But whether the court-martial had or had not jurisdiction in the case of the claimant, it is submitted that he can not recover upon the claim presented in his petition, because it is laid down in *Blake* v. *United States* (103 U. S., 227) as sound constitutional doctrine that "The President has the power to supersede or remove an officer of the Army or Navy by the appointment, by and with the advice and consent of the Senate, of his successor." The principle decided in that case is that when an army or navy officer has been dismissed

from office the filling of the vacancy caused by his removal by the appointment of another person to that vacancy, by and with the advice and consent of the Senate, ratifies the removal, and consequently ratifies the action of the official or officer who made the removal.

This principle is too well settled to be questioned now; but if it should be held that it does not apply here, our answer is that it is not necessary to apply it, because, in contemplation of law, claimant was dismissed by the President of the United States, and therefore it is unnecessary to say anything about filling a vacancy in office.

CLAIMANT'S DISMISSAL FROM OFFICE BY THE SECRETARY OF THE NAVY WAS A DISMISSAL BY THE PRESIDENT OF THE UNITED STATES.

No question has been made in this case denying the *fact* that the claimant was dismissed from the Navy "in pursuance of the sentence of a general court-martial," as prescribed in article 36, section 1624, of the Revised Statutes (act July 13, 1866, section 5, 14 Stats., 92); nor has it been alleged that he was not dismissed by the President. Obviously the latter allegation could not be sustained. It is true that the letter of dismissal set forth in the petition was written by the Secretary of the Navy, but Mr. Bishop's dismissal must be regarded as the act of the President. It is true that in Carter's case the officer was dismissed "By direction of the Secretary of War"—"By command of Major-General Miles: H. C. Corbin, Adjutant-General" (183 U. S., 374). But that mode of dismissal was not questioned by the Supreme Court. It is a well-settled principle

that the Secretary of the Navy is the regularly constituted organ of the President for the administration of the naval establishment of the nation, and that rules and orders publicly proclaimed by him must be regarded as the acts of the President (*Eliason* v. *United States*, 16 Pet., 291–302). Many cases might be cited in support of this doctrine; a few will suffice. In *Wilcox* v. *Jackson* (13 Pet., 498–513) an act of Congress provided that reservations of public lands should be made by order of the President. The land at Fort Dearborn, near the mouth of the Chicago River, was mapped out as a military reservation by the General Land Office at the request of the Secretary of War, and no order of the President for that reservation appeared in the record. Mr. Justice Barbour, delivering the opinion of the Supreme Court, said:

> Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was, in legal effect, a reservation made by the order of the President, within the terms of the act of Congress.

The mode of approving the sentence of the general court-martial and of the dismissal of the officer in the case at bar, and as to whether it was wisely or unwisely adopted, can not be questioned in this court, because:

> "The right of so considering and treating the authority of the Executive, vested as he is with the command of the military and naval forces, would not be intrusted to officers of any grade inferior to the commander in chief; its consequences, if tolerated, would be a complete disorganization of both the Army and Navy." (*United States* v. *Eliason, supra.*)

And it is not vested in any civil court.

The same doctrine is recognized in *Williams* v. *United States.* (1 How., 290–297.) Delivering the opinion of the Supreme Court in that case, Mr. Justice Daniel, referring to the act of Congress of January 31, 1823, which expressly prohibited the advancing of public money in any case whatsoever, except under the special direction of the President to the disbursing officers of the Government, and answering the contention that the correct interpretation of the statute required this direction to be given in every instance under the President's own hand, said:

> Such an interpretation of the law this court can by no means admit. * * * The President's duty in general requires his superintendence of the administration; yet this duty can not require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incidental to services, which, nevertheless, he is, in

> a correct sense, by the Constitution and laws, required and expected to perform. This can not be * * * because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the Government in the personal action of the one chief executive officer. It can not be, for the stronger reason, that it is impracticable, nay, impossible.

What time has the Chief Executive to personally review proceedings of courts-martial?

As the President approved the sentence of the court-martial, it might be said that in effect the claimant was then and there dismissed by operation of law, and there only remained the ministerial duty of informing him of his dismissal from the Navy; therefore, whether the President directly reviewed the record or wrote the letter of dismissal or used his proper instrument, the Secretary of the Navy, for that purpose is not material. (*United States* v. *Page*, 137 U. S., 673; *United States* v. *Fletcher*, 148 U. S., 84; *Ide* v. *United States*, 150 U. S., 517; *Carter* v. *McClaughry*, 183 U. S., 365.) The claimant was dismissed from the service by the approval of the sentence of the court-martial by the President; or else he was dismissed by the President for some other reason which does not appear in the case, and in respect to which no court has jurisdiction to inquire.

IV.

THE PRESIDENT OF THE UNITED STATES HAS UNRESTRAINED POWER TO REVOKE THE COMMISSION OF ANY OFFICER OF THE ARMY OR NAVY FOR ANY REASON SATISFACTORY TO HIMSELF.

Delivering the unanimous opinion of the Supreme Court in *Crenshaw* v. *United States* (134 U. S., 99–107), Mr. Justice Lamar, referring to *Blake* v. *United States* (103 U. S., 227), wherein the opinion of the Attorney-General was quoted with approval to the effect that in respect to their official tenure "there is no difference in law between officers in the Army and other officers of the Government," said:

> Applying the above principles it remains to say that we know of no instance in which their assertion is more imperatively demanded by the public welfare than in this case, and such others as this. If the position taken by the appellant is correct, then a logical and unavoidable result is, that our country, if ever we are so unfortunate as to be again involved in war, will be compelled, after the treaty of peace, to maintain the entire official force of the Army and Navy, and a host of sinecurists in full pay so long as they shall live; either that or to disband the Army and Navy before the peace shall be made, even this wholly inadmissible alternative being legally possible from one of appellant's positions. It is impossible to believe that such a condition of affairs was ever contemplated by the framers of our organic or statute law.

This was a case where the claimant sued in this court for pay as an officer of the Navy after he was discharged by the Secretary of the Navy. He claimed that he had a contract right to the pay, but the Supreme Court *held* that he had no such right; that where an officer is appointed for a definite time, or during good behavior, he has no vested interest or contract right in his office, and that article 36, section 1624 of the Revised Statutes, does not vest naval officers with any contract right to their offices or the salaries thereof, or give them any vested interest in the same. In respect to this point, Mr. Justice Lamar said:

> Our courts, both State and National, look on these questions through the form to the substance of things; and, in substance, the statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revokable by the sovereignty at will; * * *

This case also confirms the well-settled principle that when an officer, either civil or military, has been removed from his office by competent authority, he has no valid claim to the emoluments of the office from which he has been removed.

The question as to the constitutional power of the President to dismiss any officer of the United States before the expiration of his *statutory* term of office was

elaborately argued before and fully considered by both this court and the Supreme Court in the case of *Parsons* v. *United States* (30 C. Cls. R., 222; and 167 U. S., 324). Delivering the unanimous opinion of the Supreme Court affirming the judgment of this court, Mr. Justice Peckham, answering the contention of counsel for the appellant "that the President had no power to remove District Attorney Parsons from office prior to the expiration of the four years term of office prescribed by section 769 of the Revised Statutes, and to appoint a successor to him by and with the advice and consent of the Senate," said, that section 769, which provided that "district attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates," did not entitle the persons so appointed "to hold for four years as against any power of the President to remove, and in no event can they remain in office longer than that period without being reappointed. This construction of the act as one of limitation, we think, in the light of the history of the subject, is a most natural and proper one." (*Ib.*, 342.)

In the opening part of the opinion there is an able and elaborate review of the "constitutional history of the subject relating to the President's power of removal and the debates which have taken place in Congress in regard to it." (*Ib.*, 329–335.)

"The question," says Mr. Justice Peckham, "arose in the first session of the first Congress, which met immediately after the adoption of the Constitution."

The views of that Congress, of Madison, Adams, Kent, Marshall, Webster, and of other great statesmen and lawyers on this question are cited by him, and, adopting the language of Mr. Justice Thompson, speaking for the Supreme Court on the power of re-removal *In re Hennen*, 13 Pet., 230, 259, he said:

> No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution.

And further quoting from the unanimous opinion in that case, Mr. Justice Peckham said: In the early history of the Government it became "the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone in such cases [that is, where the tenure was not fixed by the Constitution], although the appointment of the officer was by the President and Senate."

The opinions of the law officers of the Government on this question are also cited by Mr. Justice Peckham as being "in harmony with the foregoing views." These opinions were to the effect that the President had the power to remove any officer of the United States whose term was not fixed by the Constitution.

"This power," said the learned justice, "has been recognized as extending to officers of the Army and Navy;" and he cites the opinion of Attorney-General Cushing in the case of *Lansing* (6 Op. Atty. Gen., 4); the case of *Colonel Belger* (12 Op. Atty. Gen., 421, 425); and the opinion of Attorney-General Devens (15 Op. Atty. Gen., 421). The question considered in these opinions was in respect to the power of the President alone to dismiss an officer from the military service; and he quotes with approval the following language of Attorney-General Cushing: "I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the Army and other officers of the Government. As a general rule, with the exception of judicial commissions, they all hold their offices by the same tenure in this respect."

> The foregoing references [said Mr. Justice Peckham] to debates and opinions have not been made for the purpose of assisting us in arriving at a decision of the question of the constitutional power of the President in his discretion to remove officials during the term for which they were appointed and notwithstanding the existence of a statute prohibiting such removal, but simply for the purpose of seeing what the views of the various Departments of the Government have been upon the subject of the power of the President to remove, and what claims were made and what acquiescence had been given to the proposition that to the President belonged the exclusive power

> of removal in all cases other than by way of impeachment. It is unnecessary for us in this case to determine the important question of constitutional power above stated.
>
> The short review we have taken throws light upon the question of the true construction of the language used by Congress in the section of the Revised Statute under examination.

According to that review and the authorities discussed in the unanimous opinion in Parson's case, the conclusion would seem to be inevitable that if it had been necessary to judicially determine in his case "the important question of constitutional power above stated," the Supreme Court would have *held* that the President of the United States has full power to remove from office any civil or military officer of the United States for any reason that may be satisfactory to himself, notwithstanding that there may be an act of Congress prescribing the term of the office or the cause of removal, or attempting to impose any restraint upon that power. Whether the case at bar requires that constitutional question to be determined is, of course, left to the discretion of the court.

Speaking of the provisions of the statute cited in *Parson's case*, which provided that certain officers of the United States were to be appointed for a term of four years, "but shall be removable from office at pleasure," Mr. Justice Peckham said that the purpose of Congress was not to grant an unconditional term of office for that period; that the statute was an act of limitation and not of grant; and that—

> The provision for the removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was regarded as being clothed with such power in any event. Considering the construction of the Constitution in this regard as given by the Congress, of 1789, and having in mind the constant and uniform practice of the Government in harmony with such construction, we must construe this act as providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time, and we think the provision that the officials were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove.

The constitutional principle recognized throughout the whole opinion in *Parson's case* is that the President has the power to remove from office any officer of the United States, except judges whose tenure has been fixed by the Constitution; and that statutes prescribing terms of office and tenure of office are to be construed in harmony with this principle. It therefore follows that, as the claimant was removed by the President from the office of lieutenant-commander on the active list of the Navy of the United States, it is not material to the merits of the present case to determine whether the court-martial before which he was tried had or had not jurisdiction, or whether they erred in any of their proceedings. The fact remains that he was dismissed

from his office by the action of the President. Congress subsequently recognized the validity of that dismissal by passing a special resolution authorizing the President to reappoint him, by and with the advice and consent of the Senate, to the office of lieutenant-commander. (16 Stat., 597.) Claimant accepted that appointment, thereby admitting to the fullest extent the validity of his dismissal from the Navy, and therefore we might say that he can not maintain a suit in this court for any part of the salary claimed in his petition.

But we do not care to resort to the doctrine of estoppel to escape a judicial determination of the important questions presented in the case.

In view of the large number of naval court-martial cases which are now encumbering the dockets of this court [Court of Claims] and imposing so much irksome and, we think, unnecessary work, not only upon the court, but also upon the Navy Department, we respectfully suggest that the jurisdiction of this court in such cases should be clearly defined. Until this is done, attempts will be made to instigate contempt in the naval service for military discipline by courts-martial, and of the Commander in Chief himself. Therefore, neither the sentences of these courts, nor the action of the President upon them, should ever be regarded as void by any civil courts *except upon the very clearest jurisdictional grounds.* When general courts-martial are convened by the Secretary of the Navy, or by the commander in chief of a fleet or squadron, in contemplation of law they are convened by the President himself as Commander in Chief of the Navy. He alone is "the court of

last resort" (*Carter's case, ante*), and all officers and seamen may appeal to him. In this respect, as well as in respect to the power of removal, his is the "sovereignty" mentioned by Mr. Justice Lamar (*Crenshaw* v. *United States, ante*).

As long as this constitutional sovereignty of the Commander in Chief is admitted and respected by the courts, our armies and navies will continue to be—what they always have been—INVINCIBLE. To quote from an article "On the Presidency," written a few years ago by a distinguished soldier and statesman of the highest authority—

> The President of the United States occupies a position of peculiar importance. In the whole world there is no other ruler, certainly no other ruler under free institutions, whose power compares with his. * * *

But while the powers of the Commander in Chief are sovereign, and plenary in every respect as to courts-martial and to removals from office, they are what the framers of the Constitution intended them to be—not autocratic; but are to be exercised with wisdom and discretion, and under a sense of responsibility to the people, similar to the sovereignty of Congress, of which it has been said by that greatest expounder of the Constitution, Chief Justice Marshall, when delivering the opinion of the Supreme Court in *Gibbons* v. *Ogden* (9 Wheat., 197):

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at

> elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

Thus the Government of the United States, as was stated by the same great jurist, is "emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit." (*McCulloch* v. *Maryland*, 4 Wheat., 316, 405; and Mr. Lincoln at Gettysburg).

The sovereign powers of the Commander in Chief of the armies and navies of the United States are therefore not to be restricted nor his action reviewed or reversed by even the highest judicial courts. They must always be presumed to be exercised for the benefit of the people.

LOUIS A. PRADT,
Assistant Attorney-General.

FELIX BRANNIGAN,
Assistant Attorney.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOSHUA BISHOP, APPELLANT,
v.
THE UNITED STATES. } No. 92.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In direct reply to the specific contentions of the appellant, the United States presents this additional brief.

POINT I.

The first point made in the brief of appellant is that the court-martial which tried the appellant had no jurisdiction, because he had already been punished for the alleged offense.

The appellant was charged at the court-martial proceedings with drunkenness and neglect of duty while serving as the executive officer of the United States steamer *Wyoming*, then lying in the harbor of Nagasaki, Japan. These offenses of which he was found guilty by the court-martial were committed on May 30, 1867, and on his return to his ship on the following morning he was suspended from duty by the officer in

command of the *Wyoming*, at some time from 4 to 8 in the morning, as shown by the log, and a report at once made of the whole matter to the rear-admiral commanding the squadron, who, on the same day, by letter to the commander of the *Wyoming*, ordered that the appellant be restored to duty to await an opportunity for time to investigate the case. Accordingly, at 6.40 p. m. of the same day, as appears by the log, the appellant was restored to duty. (Finding VI, Rec., p. 31, Exhibit E, claimant's petition, Rec., p. 23.)

There is nothing in these facts to show that the suspension of the appellant was in the nature of punishment for the offenses committed by him, nor that his restoration to duty was a termination of such punishment. On the contrary, it is perfectly evident that the appellant was so suspended pending a report of the commander of the *Wyoming* to the rear-admiral and instructions thereon, while the letter of the rear-admiral ordering that he be restored to duty, conclusively shows that such restoration was not intended as a termination of any punishment, since it specifies that it was done "to await an opportunity for time to investigate the case." And, indeed, nothing more preposterous can be imagined than that a mere suspension from duty for a period of about twelve hours was intended by the commanding officer of the ship and the commander of the fleet to be complete punishment for the grave offenses of drunkenness and neglect of duty charged against the appellant.

A subpoint of Point I is that if the suspension of the

appellant was not a punishment, it was an arrest in the court-martial proceedings, and that by the naval regulations he should have then and there been served with a copy of the charges and specifications. There is nothing in the record to support this contention, and nothing to show that appellant was arrested in any way at the time of his suspension from duty. On the contrary, the record shows explicitly that on the 5th of September, 1867 (by clerical error Finding II, as set forth in the transcript, reads December instead of September), the appellant was placed under arrest to await trial by court-martial and served a copy of charges. (Finding II, transcript, p. 26.) And this was the first and only arrest in the court-martial proceedings appearing on the record, at which time, as shown by the record, he was served with a copy of the charges against him, in full compliance with the naval regulations.

POINT II.

Appellant's second point is that the court-martial which tried him was illegally constituted, because composed of only seven members, and because the record of the court-martial does not show affirmatively that the full number of thirteen officers could not be convened without injury to the service.

This is fully answered in the opinion of the court below, as follows:

> In reply to this contention it may be said that the Supreme Court has held in substance that when the commander in chief of a squadron not in the waters of the United States convenes a

> court-martial to try an officer, the courts of the United States will assume, when his action in this respect is attacked collaterally, and nothing contrary appears on the face of the order convening the court, that he properly exercised his discretion, and that the trial of the accused by such a court could not be avoided without inconvenience to the service. (*Mullan* v. *The United States*, 140 U. S, 240.) That decision was in affirmance of the decision of this court (23 C. Cls. R., 40), in which is quoted approvingly, "Wherever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." (Rec., p. 41.)

Furthermore, the appellant raised no such objection to the court at the opening of the court-martial proceedings. On the contrary, when asked by the judge-advocate if he knew of any reason why the court should not proceed with his trial, he replied "No." (Rec., p. 7.)

POINT III.

The third point of appellant is that said court-martial proceedings were void, because the rear-admiral who convened the court did not appove or confirm the findings and sentence of the court.

Here again the opinion of the court below furnishes a complete answer:

> In this case the commanding officer transmitted the proceedings of the court to the Secretary of the Navy, for the consideration of the

President, without any suggestions, under the nineteenth article of the act for the better government of the Navy, approved July 17, 1862 (*supra*). The latter part of that article reads as follows: "All other sentences may be determined by a majority of votes, and carried into execution on confirmation of the commander of the fleet or officer ordering the court, except such as go to the dismission of a commissioned or warrant officer, which are first to be approved by the President of the United States." The action of the commanding officer was founded upon the construction of the law, that because the sentence involved the dismission of the claimant it did not require him to take any action in the matter, except to forward the papers to be submitted to the President, in which construction of the law, in the opinion of the court, the officer was correct, and his failure to take any further action did not have the effect to nullify the proceedings of the court-martial. (Rec., p. 40.)

POINT IV.

The final contention of the appellant is that the proceedings and sentence of the court-martial, as well as the order of dismissal, are absolutely void, because the sentence of the court-martial was not confirmed by the President of the United States.

It appears from Finding V (Rec., pp. 29 and 30) that a brief of the proceedings of the court-martial by which the appellant was tried and convicted, setting forth the charges and specifications and the sentence of the court "to be dismissed from the service of the

United States," and reciting that "the evidence in the case is positive and clear and the finding of the court sustained thereby," and that "the sentence of the court is just and proper," was, on the 3d day of December, 1867, submitted by the Secretary of the Navy to the President for his action and on the same day approved by the President. Also that this action was followed by the dismissal of the appellant from the naval service.

This record seems to be conclusive. Counsel for the appellant alleges in respect to it, to be sure, that this brief was prepared by a clerk, and that the President did not have before him the court-martial proceedings at any time, but there is nothing in the record to support this assertion. On the contrary, the presumption must be that the Secretary and the President performed the duties devolved upon them in the premises. *Fletcher* v. *The United States*, 148 U. S., 84, quoted in the opinion of the court in this case on page 39. And as the court below well said on this point:

> In this case the approval of the President is founded on a condition of facts which affirmatively shows that he was advised in the premises by a knowledge of the case. He might not have read the entire record, but he had such knowledge as would enable him to pass intelligently and knowingly upon the question of the regularity of the proceedings and the justice of the sentence.

LOUIS A. PRADT.
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 92.—October Term, 1904.

Joshua Bishop, Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[April 3, 1905.]

This is a petition for pay as a Lieutenant Commander from February 8, 1868, when defendant was dismissed from the naval service pursuant to the sentence of a general court martial, until March 9, 1871, when he was reinstated by special act of Congress. The Court of Claims made a finding of facts, the material parts of which are incorporated in the opinion, and dismissed the petition. (38 Ct. of Clms. 473.)

Mr. Justice Brown delivered the opinion of the Court.

This case depends upon the validity of the findings and sentence of the court martial, and is brought under an act of Congress approved June 6, 1900, (31 Stat. 1612,) nearly thirty years after petitioner was recommissioned as a Lieutenant Commander, which enacted "that the claim of Joshua Bishop for alleged items of pay, due and unpaid to him for services as a Lieutenant Commander . . . be, and the same is hereby referred to the Court of Claims. Jurisdiction is hereby conferred on said Court to try said cause, and the statute of limitations shall not apply thereto, and to render final judgment therein, and subject to the right of appeal by either party." Claimant insisted in the Court below that this statute was not a mere waiver of limitations, but a recognition that claimant was a Lieutenant Commander during the time referred to in the act, but as this point is not made in the briefs filed in this Court, it may be considered as abandoned.

The action of the court martial in dismissing the petitioner from the service is attacked upon the following grounds:

1. That the Court had no jurisdiction over him, because he had already been punished for the offences charged against him, viz., drunkenness and neglect of duty.

It appears from the findings that Bishop was a Lieutenant Commander in the naval service, attached to the steamer Wyoming, then lying in the harbor of Nagasaki, Japan; that he was ordered by his commanding officer to have his ship ready for sea by daylight on the morning of the 31st of May, 1867, but that he went ashore and did not return until after daylight. On May 31 the following entries appear on the log:

"From 4 to 8 A. M.

"Lieutenant Commander Joshua Bishop was suspended from duty by order of Lt. Commander C. C. Carpenter.

GEORGE B. GLIDDEN, *Master.*"

"From 6 to 8 P. M.

"At 6.40 Lt. Comdr. Joshua Bishop was restored to duty by order of Rear Admiral H. H. Bell.

GEORGE B. GLIDDEN, *Master.*"

Upon being placed on trial before the court martial Bishop pleaded that he was placed under arrest for the offences specified, (drunkenness and neglect of duty,) but was ordered released from arrest by Rear Admiral Bell; and in this connection refers the court to paragraph 1205, Navy Regulations of 1865, then in force, as follows:

"An offence committed at any one time, for which a person in the Navy shall have been placed under arrest, suspension or confinement, and subsequently entirely discharged therefrom by competent authority, or for which he shall have been otherwise fully punished, is to be regarded as expiated, and no further martial proceedings against him for the offence itself are ever afterwards to take place," etc.

Conceding that the petitioner was within the letter of the regulations, inasmuch as he was suspended from duty in the morning of May 31 and restored to duty on the evening of the same day, we do not think the case is within its real meaning, which looks to a *punishment* of the offence by such suspension. As it appears that Bishop was intoxicated during the preceding day, and went ashore and failed to report at daylight on the next morning, it would naturally be inferred that his suspension from duty was not intended as a punishment, but as a reasonable precaution for the maintenance of good order and discipline aboard.

That this was the understanding of the Rear Admiral is evidenced from the following letter restoring him to duty:

"U. S. Flagship Hartford,
Nagasaki, Japan, May 31, 1867.

Lieut. Comm'd'r C. C. CARPENTER,
Comm'd'g U. S. S. Wyoming, Nagasaki.

"SIR: Your communication of this date, reporting Lieutenant Commander Bishop to me, is received.

"You will restore Lieutenant Commander Bishop to duty to *await an opportunity for time to investigate the case.*

I am, sir, very respectfully,

H. H. BELL,
Rear Admiral, Commanding U. S. Asiatic Squadron."

It is quite evident that the words "arrest, suspension or confinement," in paragraph 1205, contemplate an action in the nature of a punishment, upon the infliction of which the offence is to be regarded as expiated; but as the order restoring Bishop to duty was on its face merely to give "time

to investigate the case," we do not think the order of suspension could have been intended as a punishment in itself, or as an expiation of the previous offence, nor did the order of Admiral Bell "entirely discharge" the accused within the meaning of § 1205 of the Navy Regulations.

2. No further proceedings appear to have been taken until June 21, 1867, when charges and specifications were preferred by Rear Admiral Bell, and on September 5, 1867, the following entry appears upon the log:

"From 4 to 8 A. M.

"Lt. Comdr. Joshua Bishop *placed under arrest* to await trial by court martial, and *served with copy of charges*, by order of Rear Admiral H. H. Bell, comdg. U. S. Asiatic squadron.

E. F. CRAWFORD, *Mate.*"

The petitioner cites in this connection Article 38 of the laws regulating the Navy, approved April 23, 1800, (2 Stat. 50, 51,) providing that "all charges on which an application for a general court martial is founded shall be exhibited in writing to the proper officer, and the person demanding the court shall take care that the person accused be furnished with a true copy of the charges, with the specifications, *at the time he is put under arrest*," and insists in this connection that he should have been served with a copy of the charges and specifications on May 31, 1867, when he was suspended. The objection is unfounded.

As already indicated, the first arrest was a temporary precaution for the preservation of good order and for further investigation. There was no opportunity for the preparation of charges and specifications, and evidently this was not the arrest contemplated by the above act.

It is true that paragraph 1202 of the Naval Regulations of 1865 provides that offenders shall be brought to trial within thirty days after notice to the proper authority, empowered to convene such court, or shall be released from arrest and returned to duty, and so remain until a court martial can be convened to try him, "when he shall be again arrested on the day before the court is convened, so as to undergo his trial before it." As petitioner had been "released from arrest and returned to duty" on May 31, and so remained until September 5, when he was "again arrested" on the day before the court martial was ordered to convene; and as he was served with a copy of the charges and specifications on the day he was arrested, we see nothing in these proceedings of which he is entitled to complain. The point is completely covered by *Johnson* v. *Sayre*, (158 U. S. 109, 117.)

3. Petitioner's contention that the court martial was illegally constituted rests upon article 11 of the act of July 17, 1862, (12 Stat. 605,) providing that "no general court martial shall consist of more than thirteen nor less than five commissioned officers as members; and as many officers shall be summoned on every such court as can be convened without injury to the

service, so as not to exceed thirteen; and the senior officer shall always preside, the others taking place according to their rank; and in no case, where it can be avoided without injury to the service, shall more than one-half the members, exclusive of the president, be junior to the officer to be tried."

The argument is that as the court martial consisted of only seven officers it had not power or authority to try and sentence petitioner without showing affirmatively that no more could be convened without injury to the service. As the court martial consisted of more than five commissioned officers, viz., seven, all of whom were of equal or superior rank to the petitioner, it was a question for the officer convening the court to determine whether more could be convened without injury to the service, and we do not think his action or non-action in this particular can be collaterally attacked. The regulations have been recently amended in that particular. As the accused when arraigned said he had no objection to any member of the court, and knew of no reason why the court should not proceed with his trial, it is manifestly too late to raise the objection, in view of our decision in *Mullan* v. *United States*, (140 U. S. 240,) in which we held that when the commander-in-chief of a squadron not in the waters of the United States, convenes a court martial, more than one-half of whose members are juniors in rank to the accused, the courts of the United States will assume, when his action is attacked collaterally, that he properly exercised his discretion, and the trial of the accused by such a court could not be avoided, without inconvenience to the service. The rank and number of the members of a court martial must necessarily be, and is, left somewhat to the discretion of the officer convening the court. There is nothing in this case to indicate an abuse of discretion, or that a larger number of officers might have been convened without injury to the service, although if the accused had taken prompt advantage of the defect it might have been necessary to show that a larger number could not have been obtained. His expressed satisfaction with the court as constituted was a clear waiver of any objection to its personnel.

4. The objection that the court martial proceedings are void because its sentence was not approved or confirmed by Rear Admiral Bell, who convened the court, is answered by Articles 19 and 20 of the act of July 17, 1862, for the better government of the Navy. (12 Stat. 605.) The first of these articles provides that "all sentences of courts martial which shall extend to the loss of life shall require the concurrence of two-thirds of the members present," as well as confirmation by the President. "All other sentences may be determined by a majority of votes, and carried into execution, on confirmation of the commander of the fleet, or officer ordering the court, except such as go to the dismission of a commissioned or warrant

officer, which are first to be approved by the President of the United States." As the sentence in this case extended to a dismissal from the service, no confirmation was necessary by Admiral Bell, whose duty was discharged by forwarding the papers to the President.

Petitioner relies upon Article 20 of the same act, which declares that "Every officer who is by this act authorized to convene courts martial shall have power, on revisal of its proceedings, to remit or mitigate, but not to commute the sentence of any such court, which he is authorized to approve and confirm." Obviously, this article extends only to such sentences as the convening officer is authorized to approve and confirm, and has no application where the punishment of dismissal is imposed.

5. The last point made is that the court martial proceedings are void because the sentence was never confirmed by the President of the United States. The record shows that the proceedings of the court martial were forwarded and submitted to the Secretary of the Navy for the action of the President, under Article 19, above quoted; that the papers were submitted to some officer connected with the Navy Department, who made a statement, termed a "brief," of the findings of the court, and added the following: "The evidence in the case is positive and clear, and the findings of the court sustained thereby. Lieut. Comdr. Bishop produces no witnesses in his behalf, and the statement made by him to the court is lame throughout. There is no recommendation by the court for clemency."

December 3, 1867, the Secretary of the Navy certified that the case was submitted to the President for his action in accordance with Article 19 of the above act, to which are added the words: "Approved: Andrew Johnson."

On February 8, 1868, the Secretary of the Navy addressed to the petitioner a letter notifying him of the sentence of court martial, and added as follows: "The sentence of the court in your case *having been approved by the President*, you are hereby dismissed from the Navy service," etc. It is difficult to see how the personal approval of the President could appear more clearly than in this case. In *United States* v. *Fletcher*, (148 U. S. 84,) there appeared only the certificate of the Secretary of War that the proceedings of the court martial were forwarded to the Secretary of War for the action of the President, and that "the proceedings, findings and sentence are approved;" but it was held that the order was valid, though it did not appear that the President personally examined the proceedings and approved the execution of the sentence. Criticism was made in that opinion of *Runkel* v. *United States*, (122 U. S. 543,) upon the ground that the circumstances of that case were so exceptional as to render it an unsafe precedent in any other. It was held in that case that there was no sufficient evidence that the action of the court martial was

approved, and it followed that the officer was never legally dismissed the service. No such criticism can be made here, as it not only appears from the letter of February 8 that the sentence of the court had been approved by the President, but his approval distinctly appears at the foot of the brief.

We find nothing in this case of which the petitioner has any just reason to complain. The proceedings of the court martial were conducted with a substantial, if not a literal, conformity to the law, and we must presume, at least, that there was sufficient evidence to support the sentence. While drunkenness is not ordinarily considered as criminal, the intoxication of a naval officer while on duty is a gross breach of discipline, and liable to be attended by very serious consequences. Congress evidently acted with forbearance and generosity in reinstating petitioner in the service after a lapse of three years, and thereby condoned the offence. But it has never directly or indirectly intimated that petitioner was entitled to pay during the suspension.

The judgment of the Court of Claims is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.